TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 317

CHARLES HAMMER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1923

CERTIORARI GRANTED APRIL 23, 1923

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(30,958)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1925

[fol. 1] **IN UNITED STATES DISTRICT COURT**

INDICTMENT

Southern District of New York, ss: The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district upon their oath present:

That on the 18th day of April, 1923, a petition was filed in the United States District Court for the Southern District of New York, praying that one, Annie Hammer, be adjudicated a bankrupt under and in accordance with the Acts of Congress of July 1, 1898, and the amendments thereto commonly known as the Bankruptcy Act; that on April 28, 1923, said Annie Hammer was duly adjudicated a bankrupt by said United States District Court and the said matter and proceeding was duly referred to Stephen H. Thayer, one of the referees in bankruptcy of the said United States District Court, who was duly appointed and qualified to act as such and who is hereinafter referred to as "said referee" to take all such further proceedings therein as required by the said acts of Congress;

That heretofore on the 2nd day of July, 1923, and continuously thereafter down to and including the 25th day of October, 1923, at the Southern District of New York and within the jurisdiction of this court, and while the said proceeding in bankruptcy of Annie [fol. 2] Hammer was duly and regularly pending before the said referee, as aforesaid, Charles Hammer, the defendant herein, unlawfully did knowingly, wilfully and corruptly suborn, instigate, induce and procure one Annie Hammer to duly take an oath before the said referee Stephen H. Thayer in the said proceeding in bankruptcy then and there pending before the said referee, that she, the said Annie Hammer, would testify, declare, depose and certify truly to maferial matters relative to the said proceeding in bankruptcy, concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and to wilfully and contrary to such oath, state material matter hereinafter more particularly set forth, which neither the defendant herein nor the said Annie Hammer then or at any other time, believed to be true.

That on the 2nd day of July, 1923, at the Southern District of New York and within the jurisdiction of this Court, the said Annie Hammer at the instigation and procurement of the defendant herein did appear and present herself as she had been duly required before the said referee as a witness to give evidence concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and the said Annie Hammer, was then and there duly sworn and took her oath as such witness before the said referee that the evidence which she, the said Annie Hammer, should give in the said matter and proceedings in bankruptcy should be the truth, the whole truth and nothing but the truth;

That the said referee then and there duly administered to the said [fol. 3] Annie Hammer the said oath; that the said referee then and

there had the authority and was a competent person to administer the said oath, and did administer the said oath to the said Annie Hammer as aforesaid; that the said matter and proceeding aforesaid and the hearing thereon before the said referee was a case in which a law of the United States authorized on oath to be administered and said oath was authorized and administered under and by virtue of a law of the United States of America.

And the said Annie Hammer so being duly sworn as aforesaid it did then and there upon the hearing in said proceeding aforesaid become and at all the times herein mentioned was a material matter and inquiry in the said matter and proceeding in bankruptcy aforesaid:

(a) Whether one Herman Warton had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer, the sum of $400 or any other sum.

(b) Whether the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or any other sum, theretofore and prior to the 18th day of April, 1923.

(c) Whether the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton a promissory note for the sum of $400 dated December 1, 1922.

(d) Whether one Louis Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer, the sum of $500 or any other sum.

[fol. 4] (e) Whether the said Annie Hammer had borrowed from the said Louis Trinz the sum of $500, or any other sum theretofore and prior to the 18th day of April, 1923.

(f) Whether the said Annie Hammer had theretofore and prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis Trinz her promissory note for the sum of $500, dated October 14, 1922;

That thereupon the said Annie Hammer in consequence and by means of said wilful and corrupt subornation, instigation, inducement and procurement of the defendant herein, having been duly sworn, and having taken her oath aforesaid, on the 2nd day of July, 1923, within the district aforesaid and within the jurisdiction of this court, upon the hearing in the said matter and proceeding in bankruptcy aforesaid did falsely, corruptly, knowingly, wilfully, fraudulently and contrary to said oath, swear, depose, testify and state before the said referee upon the hearing in the said matter and proceeding in bankruptcy aforesaid, among other things in substance and to the following effect, that is to say:

(a) That the said Herman Warton had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $400 or some other sum.

(b) That the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or some other sum theretofore and prior to the 18th day of April, 1923.

[fol. 5] (c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton her promissory note for the sum of $400 dated December 1, 1922.

(d) That the said Louis H. Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500 or some other sum.

(e) That the said Annie Hammer had theretofore and prior to the 18th day of April, 1923, borrowed from the said Louis H. Trinz the sum of $500 or some other sum.

(f) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis H. Trinz, her promissory note for the sum of $500, dated October 14, 1922.

Whereas, in truth and in fact, it was not true at the time of so swearing, deposing, testifying and stating, said Annie Hammer and the defendant herein did not believe it to be true and each of them well knew that it was not true:

(a) That the said Herman Warton did theretofore and prior to the 18th day of April, 1923, loan to the said Annie Hammer the sum of $400 or any other sum.

(b) That the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or any other sum theretofore and prior to the 17th day of April, 1923.

[fol. 6] (c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton a promissory note for the sum of $400 dated December 1, 1922.

(d) That the said Louis H. Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500 or any other sum.

(e) That the said Annie Hammer had borrowed from the said Louis H. Trinz the sum of $500 or any other sum theretofore and prior to the 18th day of April, 1923.

(f) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis H. Trinz her promissory note for the sum of $500 dated October 14, 1922.

Whereas, in truth and in fact the said Annie Hammer and the defendant herein and each of them did not believe to be true the

said matters by the said Annie Hammer sworn, testified and stated as hereinbefore specified:

Whereas, in truth and in fact the said Charles Hammer the defendant herein, at the time when he so suborned, instigated, induced and procured the said Annie Hammer to take such oath and to depose, swear, testify and state such material matters wilfully and contrary to her oath aforesaid then and there well knew that the said Annie Hammer did not then and there or at any time believe to be true:

[fol. 7] (a) That the said Herman Warton did theretofore and prior to the 18th day of April, 1923, loan to the said Annie Hammer the sum of $400 or any other sum.

(b) That the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or any other sum theretofore and prior to the 17th day of April, 1923.

(c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton a promissory note for the sum of $400 dated December 1, 1922.

(d) That the said Louis H. Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500 or any other sum.

(e) That the said Annie Hammer had borrowed from the said Louis H. Trinz the sum of $500 or any other sum theretofore and prior to the 18th day of April, 1923.

(f) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis H. Trinz her promissory note for the sum of $500, dated October 14, 1922.

And the said Charles Hammer did not then or at any time believe to be true the said material matters which he so suborned, instigated, induced and procured the said Annie Hammer to depose, swear, testify and state knowingly, wilfully, and fraudulently and contrary to her said oath as heretofore specified:

[fol. 8] And so the grand jurors aforesaid on their oath aforesaid do say that the said Charles Hammer in the manner and form aforesaid wilfully and corruptly did suborn, instigate, procure and induce the said Annie Hammer to commit wilful and corrupt perjury.

Second Count

And the grand jurors aforesaid on their oath aforesaid, do further present, that on the 18th day of April, 1923, a petition was filed in the United States District Court for the Southern District of New York, praying that one Annie Hammer be adjudicated a bankrupt under and in accordance with the Acts of Congress of July 1, 1898, and the amendments thereto commonly known as the Bankruptcy

Act; that on April 28, 1923, said Annie Hammer was duly adjudicated a bankrupt by said United States District Court and the said matter and proceeding was duly referred to Stephen H. Thayer, one of the referees in bankruptcy of the said United States District Court, who was duly appointed and qualified to act as such and who is hereinafter referred to as "said referee" to take all such further proceedings therein as required by the said acts of Congress.

That heretofore on the 2nd day of July, 1923, and continuously thereafter down to and including the 25th day of October, 1923, at the Southern District of New York and within the jurisdiction of this court, and while the said proceeding in bankruptcy of Annie Hammer was duly and regularly pending before the said referee, as aforesaid, Charles Hammer, the defendant herein, unlawfully did knowingly, wilfully and corruptly suborn, instigate, induce and [fol. 9] procure one Louis H. Trinz to duly take an oath before the said referee, Stephen H. Thayer, in the said proceeding in bankruptcy then and there pending before the said referee, that he, the said Louis H. Trinz would testify, declare, depose and certify truly to material matters relative to the said proceeding in bankruptcy, concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and to wilfully and contrary to such oath, state material matter, hereinafter more particularly set forth, which neither the defendant herein nor the said Louis H. Trinz then or at any other time believed to be true.

That on the 25th day of October, 1923, at the Southern District of New York and within the jurisdiction of this Court, the said Louis H. Trinz at the instigation and procurement of the defendant herein did appear and present himself as he had been duly required before the said referee as a witness to give evidence concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and he, the said Louis H. Trinz was then and there duly sworn and took his oath as such witness before the said referee, that the evidence which he, the said Louis H. Trinz should give in the said matter and proceeding, should be the truth, the whole truth and nothing but the truth;

That the said referee then and there duly administered to the said Louis H. Trinz the said oath; that the said referee then and there had the authority and was a competent person to administer the said oath and did administer the said oath to the said Louis H. [fol. 10] Trinz as aforesaid; that the said matter and proceeding aforesaid and the hearing thereon before the said referee was a case in which a law of the United States authorized an oath to be administered and said oath was authorized and administered under and by virtue of a law of the United States of America;

And the said Louis H. Trinz so being duly sworn as aforesaid it did then and there upon the hearing in said proceeding aforesaid become and at all the times herein mentioned was a material matter and inquiry in the said matter and proceeding in bankruptcy aforesaid;

(d) Whether one Louis Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500. or any other sum.

(e) Whether the said Annie Hammer had borrowed from the said Louis Trinz the sum of $500. or any other sum, theretofore and prior to the 18th day of April, 1923.

(f) Whether the said Annie Hammer had theretofore and prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis Trinz her promissory note for the sum of $500. dated October 14, 1922;

That thereupon the said Louis H. Trinz in consequence of and by means of said wilful and corrupt subornation, instigation, inducement and procurement of the defendant herein, having been duly sworn and having taken his oath aforesaid, on the 25th day of October, 1923, within the district aforesaid and within the juris- [fol. 11] diction of this court, upon the hearing in the said matter and proceeding in bankruptcy aforesaid, did falsely, corruptly, knowingly, wilfully, fraudulently and contrary to said oath, swear, depose, testify and state before the said referee upon the hearing in the said matter and proceeding in bankruptcy aforesaid, among other things in substance and to the following effect, that is to say:

(d) That the said Louis H. Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500. or some other sum.

(e) That the said Annie Hammer had theretofore and prior to the 18th day of April, 1923, borrowed from the said Louis H. Trinz the sum of $500. or some other sum.

(f) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Louis H. Trinz, her promissory note for the sum of $500. dated October 14, 1922.

Whereas in truth and in fact, it was not true at the time of so swearing, deposing, testifying and stating, and the said Louis H. Trinz and the defendant herein did not believe it to be true and each of them well knew that it was not true:

(d) That the said Louis H. Trinz had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500. or any other sum.

(e) That the said Annie Hammer had borrowed from the said Louis H. Trinz the sum of $500. or any other sum theretofore and [fol. 12] prior to the 18th day of April, 1923.

(f) That the said Annie Hammer had prior to the 18th of April, 1923, signed, executed and delivered to the said Louis H. Trinz her promissory note for the sum of $500. dated October 14, 1922;

Whereas in truth and in fact the said Louis H. Trinz and the defendant herein and each of them did not believe to be true, the said matters by the said Louis H. Trinz sworn, testified, and stated as hereinbefore specified, and

Whereas in truth and in fact the said Charles Hammer, the defendant herein, at the time when he so suborned, instigated, induced and procured the said Louis H. Trinz to take such oath and to depose, swear, testify and state such material matters wilfully and contrary to his oath aforesaid, then and there well knew that the said Louis H. Trinz did not then and there or at any time believe to be true:

(d) That the said Louis H. Trinz had theretofore, and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $500. or any other sum.

(e) That the said Annie Hammer had borrowed from the said Louis H. Trinz the sum of $500. or any other sum theretofore and prior to the 18th day of April, 1923.

(f) That the said Annie Hammer had prior to the 18th day of [fol. 13] April, 1923, signed, executed and delivered to the said Louis H. Trinz her promissory note for the sum of $500. dated October 14, 1922;

And the said Charles Hammer did not then or at any time believe to be true the said material matters which he so suborned, instigated, induced and procured the said Louis H. Trinz to depose, swear, testify and state wilfully and contrary to his said oath as heretofore specified:

And so the grand jurors aforesaid on their oath aforesaid do say that the said Charles Hammer in the manner and form aforesaid wilfully and corruptly did suborn, instigate, procure and induce the said Louis H. Trinz to commit wilful and corrupt perjury.

Third Count

And the grand jurors aforesaid on their oath aforesaid, do further present, that on the 18th day of April, 1923, a petition was filed in the United States District Court for the Southern District of New York, praying that one Annie Hammer be adjudicated a bankrupt under and in accordance with the Acts of Congress of July 1, 1898, and the amendments thereto commonly known as the Bankruptcy Act; that on April 28, 1923, said Annie Hammer was duly adjudicated a bankrupt by said United States District Court and the said matter and proceeding was duly referred to Stephen H. Thayer, one of the deferees in bankruptcy of the said United States District Court, who was duly appointed and qualified to act as such and who [fol. 14] is hereinafter referred to as "said referee" to take all such further proceedings therein as required by the said Acts of Congress.

That heretofore on the 2nd day of July, 1923, and continuously thereafter down to and including the 25th day of October, 1923, at the Southern District of New York and within the jurisdiction of this court, and while the said proceeding in bankruptcy of Annie Hammer was duly and regularly pending before the said referee, as aforesaid, Charles Hammer, the defendant herein, unlawfully did knowingly, wilfully and corruptly suborn, instigate, induce and procure one Herman Warton to duly take an oath before the said referee Stephen H. Thayer in the said proceeding in bankruptcy then and there pending before the said referee, that he, the said Herman Warton would testify, declare, depose and certify truly to material matters relative to the said proceeding in bankruptcy concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and to wilfully and contrary to such oath, state material matter, hereinafter more particularly set forth, which neither the defendant herein nor the said Herman Warton then or at any other time believed to be true.

That on the 25th day of October, 1923, at the Southern District of New York and within the jurisdiction of this court, the said Herman Warton at the instigation and procurement of the defendant herein did appear and present himself as he had been duly required before the said referee as a witness to give evidence concerning the goods, conduct, property and debts of the said Annie Hammer, the bankrupt, and the said Herman Warton, was then and there duly sworn and took his oath as such witness before the said referee [fol. 15] that the evidence which he, the said Herman Warton, should give in the said matter and proceeding in bankruptcy should be the truth, the whole truth and nothing but the truth.

That the said referee then and there duly administered to the said Herman Warton the said oath; that the said referee then and there had the authority and was a competent person to administer the said oath and did administer the said oath to the said Herman Warton as aforesaid; that the said matter and proceeding aforesaid and the hearing thereon before the said referee was a case in which a law of the United States authorized an oath to be administered and said oath was authorized and administered under and by virtue of a law of the United States of America.

And the said Herman Warton so being duly sworn as aforesaid it did then and there upon the hearing in said proceeding aforesaid become and at all the times herein mentioned was a material matter and inquiry in the said matter and proceeding in bankruptcy aforesaid:

(a) Whether one Herman Warton had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer, the sum of $400 or any other sum.

(b) Whether the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or any other sum, theretofore and prior to the 18th day of April, 1923.

(c) Whether the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed, and delivered to the said Herman Warton a promissory note for the sum of $400 dated December 1, 1922.

[fol. 16] That thereupon the said Herman Warton in consequence of and by means of said wilful and corrupt subornation, instigation, inducement and procurement of the defendant herein, having been duly sworn, and having taken his oath aforesaid on the 25th day of October, 1923, within the district aforesaid and within the jurisdiction of this court, upon the hearing in the said matter and proceeding in bankruptcy aforesaid, did falsely, corruptly, knowingly, wilfully, fraudulently and contrary to said oath, swear, depose, testify and state before the said referee upon the hearing in the said matter and proceeding in bankruptcy aforesaid, among other things in substance and to the following effect, that is to say:

(a) That the said Herman Warton had theretofore and prior to the 18th day of April, 1923, loaned to the said Annie Hammer the sum of $400 or some other sum.

(b) That the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or some other sum theretofore and prior to the 18th day of April, 1923.

(c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton her promissory note for the sum of $400 dated December 1, 1922.

Whereas, in truth and in fact, it was not true at the time of so swearing, deposing, testifying and stating, and the said Herman Warton and the defendant herein did not believe it to be true and each of them well knew that it was not true:

[fol. 17] (a) That the said Herman Warton did theretofore and prior to the 18th day of April, 1923, loan to the said Annie Hammer the sum of $400 or any other sum.

(b) That the said Annie Hammer had borrowed from the said Herman Warton the sum of $400 or any other sum theretofore and prior to the 17th day of April, 1923.

(c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton a promissory note for the sum of $400, dated December 1, 1922.

Whereas, in truth and in fact the said Herman Warton and the defendant herein and each of them did not believe to be true the said matters by the said Herman Warton sworn, testified and stated as hereinbefore specified, and

Whereas, in truth and in fact the said Charles Hammer, the defendant herein, at the time when he so suborned, instigated, induced and procured the said Herman Warton to take such oath and to depose, swear, testify and state such material matters wilfully and contrary to his oath aforesaid, then and there well knew that the said Herman Warton did not then and there or at any time believe to be true:

(a) That the said Herman Warton did theretofore and prior to the 18th day of April, 1923, loan to the said Annie Hammer the sum of $400 or any other sum.

(b) That the said Annie Hammer had borrowed from the said [fol. 18] Herman Warton the sum of $400 or any other sum theretofore and prior to the 17th day of April, 1923.

(c) That the said Annie Hammer had prior to the 18th day of April, 1923, signed, executed and delivered to the said Herman Warton a promissory note for the sum of $400 dated December 1, 1922.

And the said Charles Hammer did not then or at any time believe to be true the said material matters which he so suborned, instigated, induced and procured the said Herman Warton to depose, swear, testify and state wilfully and contrary to his said oath as heretofore specified;

And so the grand jurors aforesaid on their oath aforesaid do say that the said Charles Hammer in the manner and form aforesaid wilfully and corruptly did suborn, instigate, procure and induce the said Herman Warton to commit wilful and corrupt prejury.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 126 U. S. C. C.) and Acs of Congress of July 1, 1898 (Sec. 29b) (1).

Wm. Hayward, United States Attorney.

[fol. 19] In United States District Court, Southern District of New York

United States of America, Plaintiff,

against

Charles Hammer, Defendant

Bill of Exceptions

This cause came on for trial before Hon. Edwin L. Garvin, United States District Judge, and a jury, on the 28th day of March, 1924.

APPEARANCES OF COUNSEL

William Hayward, Esq., United States Attorney, for the Government;
Jac M. Wolff, Esq., Assistant U. S. Attorney, of Counsel;
Jacob Stutsky, Esq., Attorney for the Defendant; Robert H. Elder, Esq., of Counsel.

(A jury was duly impaneled and sworn.)

(Whereupon an adjournment was taken to March 29, 1924, at 10:30 a. m.)

[fol. 20] New York, March 29, 1924.

Met pursuant to adjournment.
Same appearances as before.

ARGUMENT OF COUNSEL

(Mr. Wolff opened the case to the jury on behalf of the government.)

Mr. Wolff: Before the witness is called, Mr. Elder agreed with me that he would allow the testimony produced by the Referee in lieu of the stenographer's minutes of the testimony. Is that correct, Mr. Elder?

Mr. Elder: I told Mr. Wolff that it would not be necessary for him to call the stenographer or make technical proof of the accuracy of the minutes.

Mr. Wolf: Will you consent that the testimony produced this morning by the Referee and marked Referee's copy in the matter of Annie Hammer, Bankrupt, shall be accepted as a true transcript of the testimony given by the witnesses Annie Hammer, Herman Warton and Louis H. Trinz?

Mr. Elder: Yes, subject of course to correction and errors which may be noticed as we go along.

Mr. Wolff: That could be done if the stenographers were here.

Mr. Elder: Yes, surely. I think that was only a part of the agreement that we finally entered into. I think that I was permitted to use copies too.

Mr. Wolff: Yes, when I read that testimony. I think if it please your Honor I will ask to have this marked Government's Exhibit 1 for identification.

(Marked Government's Exhibit 1 for identification.)

[fol. 21] Mr. Wolff: I think, your Honor, that this stipulation is unqualified; I am not restricted any more than if the stenographer were here. If they object again I will ask to have the stenographer here.

Mr. Elder: There was no qualification about that. That is not right, Mr. Wolff, to put that in evidence as relevant and material evidence in the case.

Mr. Wolff: I am just offering it for identification so when I am reading from it it can be identified.
Mr. Elder: That is what I understood.
The Court: Is that the understanding?
Mr. Wolff: Yes.
The Court: So ordered.
Mr. Wolff: I offer in evidence the original adjudication in bankruptcy and order of reference of Annie Hammer, Bankrupt.

(Marked Government's Exhibit No. 2.)

Mr. Wolff: I offer in evidence involuntary petition in bankruptcy filed with this court on April 18, 1923, at 3:40 p. m.

(Marked Government's Exhibit No. 3.)

Mr. Wolff: Now, if your Honor please, I offer in evidence schedules in bankruptcy in the bankruptcy petition of Annie Hammer filed in this court on June 9th, 1923.

(Marked Government's Exhibit No. 4.)

[fol. 22] Stephen H. Thayer, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Wolf:

Q. Are you, sir, a Referee in Bankruptcy for the Southern District of New York?
A. I am.

Mr. Elder: Now, if your Honor please, for the purpose of raising the question of jurisdiction, I must object upon the ground that this is not the best or proper evidence.
The Court: You mean as to the statement that Judge Thayer is a Referee in Bankruptcy?
Mr. Elder: Yes, sir.
The Court: Objection overruled.
Mr. Elder: I except; and in order to get the record right I move that the answer be stricken out upon the ground that it is not the best evidence and is incompetent.
The Court: Motion denied.
Mr. Elder: Exception.

Q. Were you such Referee in the month of April, 1923, and November, 1923?

Mr. Elder: I object to this, your Honor, as being not the best proof, and incompetent.
The Court: Objection overruled.
Mr. Elder: Exception.

A. I was.

Q. And during all the time that elapsed between those months, is that correct?

A. Yes, sir.

[fol. 23] Q. During each and very one of those months?

A. Yes.

Q. Where is your offical office located?

A. At 18 South Broadway, Yonkers.

Q. I show you this Governments's Exhibit No. 2, consisting of an adjudication in bankruptcy and order of reference, and ask you if this matter was referred to you (handing witness paper)?

A. It was.

Q. And you are the Referee mentioned in that order?

A. I am the Referee named in that order.

Q. Thereupon in pursuance of that order of reference did you hold any hearings?

A. I did.

Q. I now show you Government's Exhibit 1 for identification, consisting of the stenographer's minutes and testimony of Annie Hammer, Charles Hammer, Louis H. Trinz and Herman Warton, on July 2, October 4, October 25 and October 25, respectively, and ask you if you produced those in court this morning?

A. I did.

Q. Now, I ask you, Mr. Referee, to state to the court and jury whether you have reviewed that testimony?

A. I have read it not long ago.

Q. Do you recall the proceeding of Annie Hammer in bankruptcy before your Honor?

A. I do.

Q. Do you recall, without referring to that testimony whether or not on July 2nd, 1923, Annie Hammer appeared before you in pursuance of your direction?

A. I could not remember the date independently of the record.

Q. Mr. Referee, have you any of your official records with you?

A. Yes.

Q. Other than those minutes?

A. Yes.

Q. Mr. Referee, do you recall at all that Annie Hammer appeared before you as a witness in this proceeding?

A. I do.

[fol. 24] Q. And do you recall without referring to any records the exact day or dates upon which she appeared before you?

A. No.

Q. Is there anything from which you can refresh your recollection?

A. Yes, sir.

Q. So as to aid your memory in recalling or to recall when she came before you?

A. Yes.

Q. Have you such documents or papers with you?

A. Yes, sir.

Q. Will you kindly refer to them and answer the question as to when Annie Hammer appeared as a witness before you in the bankruptcy proceeding known as the matter of Annie Hammer, Bankrupt?

A. On the 2nd day of July, 1923.

Q. Now, by means of the same aid will you kindly tell the court and jury on what day or days Louis H. Trinz appeared as a witness in your court in the same matter?

A. On the 25th day of October, 1923.

Q. And can you also tell us on what day Herman Warton appeared as a witness before you in the same matter?

A. On the same day, the 25th of October.

Q. Now, Mr. Referee, when Annie Hammer was called as a witness in that proceeding on July 2nd, 1923, did you administer to Annie Hammer an oath?

Mr. Elder: I object to this.

The Court: Objection overruled.

Mr. Elder: Exception.

A. I did.

Mr. Wolff: If your Honor please, I wish Mr. Elder would adopt [fol. 25] the same rule as he asked me to adopt, not to make remarks or objections that seem obviously unnecessary. Mr. Elder knows this is a subornation of perjury proceeding and that the oath is the most import*ing* thing in it.

The Court: I think we are all agreed that counsel on either side has a right to interpose objection to any question asked the witness.

Mr. Wolff: Mr. Elder knows it is relevant and makes objection when it is relevant.

Mr. Elder: Must I be subject to a lecture and spoken of in this disrespectful way?

The Court: If Mr. Elder states he regards any question as one to which he is bound to interpose an objection I am sure that neither of us has anything to say to that, Mr. Wolff?

Mr. Wolff: Apparently—I won't say any more, your Honor.

The Court: Will you read the question to Judge Thayer please?

(Question read.)

The Witness: I did.

Q. Will you state in substance the oath that you administered to her?

A. The substance of the oath was that the testimony she would give in that proceeding would be the truth, the whole truth and nothing but the truth, "So help you God."

Mr. Wolff: Have the jurors all heard that? I think you have heard it several times.

Q. On October 25, 1923, when Mr. Louis H. Trinz appeared as a [fol. 26] witness in that matter of Annie Hammer, bankrupt, before you, Mr. Referee, did you administer an oath to Mr. Louis H. Trinz?

Mr. Elder: If your Honor please, I object on the ground it is incompetent.
The Court: Objection overruled.
Mr. Elder: Exception.

A. I did.
Q. That was on October 25, 1923, is that correct?
A. Yes, sir.
Q. Will you state in substance the oath you administered to Louis H. Trinz?
A. That he should tell the truth, the whole truth and nothing but the truth in the testimony he should give in this proceeding.
Q. On October 25th, did Herman Warton appear as a witness in that proceeding, and did you administer an oath to him?

Mr. Elder: I object to this, your Honor, on the same ground, as incompetent.
The Court: Objection overruled.
Mr. Elder: Exception.

A. I did.
Q. Mr. Referee, will you state the substance of it?
A. The substance of it was, You swear that the testimony you shall give in this matter will be the truth, the whole truth and nothing but the truth, so help you God.

Mr. Elder: If your Honor please, I object to the insulting conduct of Mr. Wolff in the presence of the jury.
[fol. 27] The Court: Without concurring in the characterization the objection to Mr. Wolff turning to you and bowing is sustained. Mr. Wolff, we may as well understand that this case will be tried in accordance with the direction of the court. Now, will you please confine yourself to putting your questions and raising your objections?
Mr. Wolff: Yes, sir, I will do that.

Q. Now, Mr. Referee, in pursuance of this appearance of Annie Hammer on July 2nd, 1923, did she testify?

Mr. Elder: I object to that question as incompetent.

Q. Did she give testimony in your office in these proceedings?
A. She did.
Q. On that day, namely, October 25, 1923, on which Mr. Louis H. Trinz appeared before you as a witness in the bankruptcy proceeding of Annie Hammer, bankrupt, and on the same day when the oath related to the jurors by you was administered to Louis Trinz, did he give testimony in this proceeding?
A. He did.

The Court: Before or after you administered the oath?
The Witness: After.

Q. On October 25, 1923, the day on which you testified you administered the oath of truthfulness to Herman Warton, and in pur-

suance of his appearance on that day before you as Referee in Bankruptcy in the proceeding of Annie Hammer, Bankrupt, did Herman [fol. 28] Warton give testimony?

A. He did.

Q. In each case, in the case of Annie Hammer, Louis H. Trinz and Herman Warton, was the testimony given after the oath was administered?

A. It was.

Cross-examination by Mr. Elder:

Q. Judge, you do not remember this case, do you?

A. Not independently of the record.

Q. And you do not remember the dates with the record either, do you?

A. I think I should say yes to that.

Q. Is that the best statement you can make?

A. Yes.

Q. As a matter of fact you say July 2nd and October 25th and October 4th just because you have seen it on some minutes, don't you?

A. I do not quite catch the question.

Q. I say as a matter of fact you say July 2nd and October 4th and October 25th just because you see it on some record, isn't that so?

A. No, that is not true.

Q. And because you think the record is right?

A. Partly that, yes.

Q. What?

A. That is partly so.

Q. Well, did your inspection of these entries respecting the dates refresh your recollection so that you can remember this?

A. Yes.

Q. It did?

A. Yes.

Mr. Elder: That is all.

Mr. Wolff: I will read pages 63 to 74; this is the testimony of Trinz.

[fol. 29] Mr. Elder: If your Honor please, at the present time, the charge here being subornation of perjury, I think the proper foundation has not been laid for this testimony. I can conceive that it might become admissible. Therefore, at this time I must object to it upon the ground it is incompetent, not because the stenographer is not here or because it has not been proven technically in that sense, not at all. The stipulation on the record is kept, but simply because there is no proper foundation at this time which has been laid for the introduction of the evidence.

The Court: Objection overruled, with leave to renew, and with leave to strike it from the record.

Whereupon the court read, in the absence of the jury, so much of the testimony of Louis H. Trinz, Herman Warton and Annie Hammer contained in Exhibit 1 for identification, as was received in

evidence. During the course of the reading of the testimony of Hermann Warton this occurred:

"You gave her all you had on the first occasion and that was $200?
"A. Yes.
"Q. And the next time you save in between?
"A. Part of that money, yes.
"Q. Did you not have any other money?"

Mr. Elder: I object to that.
The Court: Overruled.
Mr. Elder: Exception.
The Court (reading):

[fol. 30] "A. Possibly another debt would be paid to me and that is how it accumulated and I could not save $200 out of my salary.
"Q. Do you know where you got the last $200?
"A. I don't remember how it came to me."
"Q. How did you happen to go—how did you happen to put this lady in bankrupty?
"A. I asked her for the money and she gave me a note and when the note came due I asked her again, and she said she didn't have it to give to me."

"Mr. Elder: I object to that, that has nothing to do with it.
"The Court: The court allows it for the reason that it is relevant to the charge that there was false testimony that Mrs. Hammer gave him a note."

(At 3:05 p. m., the jury returned and by the direction of the court the stenographer reads to the jury the excerpts of testimony which have been admitted in evidence by the Judge, as follows:)

"Testimony of Annie Hammer

"Q. Do you know a man by the name of Herman Warton?
"A. Yes.
"Q. Warton?
"A. Warton? Yes.
"Q. Ever have any business dealing with him?
"A. Just a friend. I borrowed from, too, money.
"Q. When?
"A. Before I went away.
"Q. Before you went away?
"A. Yes.
"Q. And went away in July?
"A. Yes.
"Q. And how much?
"A. Few hundred dollars.
"Q. Do you know how much?
"A. No.

"Q. Your schedules say on December 23, 1922, you borrowed $400 from him?
"A. Yes.
[fol. 31] "Q. That's a mistake?
"A. Yes.
"Q. You swore to the schedules?
"A. That's a mistake. I didn't look over the schedules.
"Q. Are you sure you borrowed this money before you left?
"A. I am not sure because I told you before I borrowed from the same boys and when I came back I owed money to different people.
"Q. Do you know a man by the name of Louis H. Trinz?
"A. Yes.
"Q. Did you borrow money from him?
"A. From him too. When I came back I tried to get money from him too.
"Q. When you came back?
"A. I told you before I don't know which: I *was* mixed up and wanted to pay the girl and Dr. Greenberg's money. I was trying to get money from everybody. I thought I would pay them.
"Q. And now are not going to pay them anything?
"A. I couldn't pay that as I didn't have it.
"Q. How much did you borrow from this man Trinz?
"A. Few hundred dollars.
"Q. Don't remember that, do you?
"A. No.
"Q. Is there anything the matter with your memory?
"A. I told you before I borrowed from a lot of people to straighten it out and to have the two people, paid up.
"Q. If your memory is so poor how do you expect to pay back these people?
"A. I thought Mr. Hammer would give it to me.
"Q. You didn't know how much you owed any of these men whose names I mentioned. You don't know how much you owed Mr. Trinz?
"A. Not exactly.

[fol. 32] "Testimony of Louis H. Trinz

"Q. Are you acquainted with Annie Hammer, the bankrupt?
"A. Yes, sir.
"Q. Are you any relative of hers?
"A. No, sir.
"Q. How long have you known her?
"A. I should say about three years or so, possibly longer.
"Q. Did you ever have any kind of transaction with her?
"A. Outside of money I lent her.
"Q. You did lend her some money?
"A. Yes, sir.
"Q. About what time?
"A. Last year about this time I should say.

"Q. When did she first ask you for this money?
"A. I can't recall exactly.
"Q. How long after this interview did you lend her the money?
"A. I can't say exactly. I don't know all the details.
"Q. Was it a week?
"A. I don't know.
"Q. Was it a month?
"A. I don't remember. It is impossible as I don't know the details or remember the details.
"Q. Did you get a note from her?
"A. Yes, sir.
"Q. What is that date?
"A. I don't recall the exact date. I think you have it here on the record.
"Q. Was this the note that you referred to (indicating)?
"A. That's it as it looks like it.
"Q. Note dated October 14, 1922, payable three months after date, $500, signed by Annie Hammer?
"A. Yes, sir.
"Q. According to that note you loaned her $500?
"A. Yes, sir.
"Q. How did you happen to get this note from her?
"A. I asked her for it.
"Q. Where did you ask her for it?
"A. I don't recall.
[fol. 33] "Q. You don't know where you were when this note was given?
"A. I don't recall.

"Testimony of Herman Warton

"Q. Do you know Mrs. Hammer, the bankrupt?
"A. I do.
"Q. How long have you know- her?
"A. Four years.
"Q. She is a relative of yours?
"A. No, sir.
"Q. You come in frequent contact with her?
"A. No, sir.
"Q. Do you know her intimately?
"A. No, sir.
"Q. Did you ever have any transactions with her?
"A. Just loaned her money.
"Q. How many times?
"A. Twice.
"Q. When?
"A. Middle of 1922. I do not know the month.
"Q. How did you happen to loan money to her?
"A. I was up at the house.
"Q. Whose house?

"A. Mrs. Hammer's house.
"Q. House? Where does she live?
"A. 253 Park Avenue.
"Q. How did you happen to go up there?
"A. Went to see my brother-in-law.
"Q. Who is he?
"A. Her son.
"Q. What was it she said to you on the first occasion she loaned money?
"A. She asked if I could loan her some money.
"Q. What did she say?
"A. What?
"Q. What did she say?
"A. She didn't say.
"Q. What else did she say?
"A. Nothing else as I told her I thought I could.
"Q. Did she tell you the amount?
"A. I asked how much and she said $400, and I said I couldn't loan her $400 at once.
[fol. 34] "Q. Who else was present?
"A. I don't think nobody was present in the room at that time.
"Q. And you remember the date of that conversation approximately?
"A. No, sir, I do not.
"Q. How long after this conversation did you give her any money?
"A. I think it was two weeks, but about two weeks.
"Q. Where did you give it to her?
"A. At my house.
"Q. She called at your house also?
"A. She does occasionally.
"Q. And how much money did you give her?
"A. At that time?
"Q. Yes?
"A. $200.
"Q. In cash or check?
"A. Cash.
"Q. Where did you get the money?
"A. Well, I carry it and had it with me.
"Q. When was the next time that Mrs. Hammer asked you for money?
"A. There was no next time. I gave her $200, and told her $200 a few weeks later.
"Q. Where did you give her that?
"A. My house.
"Q. And where did you get the $200?
"A. Saved it also.
"Q. In the two weeks?
"A. No, in two weeks I didn't save it.
"Q. I understood you to say two weeks after you let her have another $200. Are you mistaken?
"A. Possibly I did.

"Q. You say you saved that?

"A. Partly. I didn't exactly take that money and put it away and save this for her.

"Q. You gave her all you had on the first occasion and that was $200?

"A. Yes.

[fol. 35] "Q. And the next time you saved in between?

"A. Part of that money, yes.

"Q. You did not have any other money?

"A. Possibly another debt would be paid to me and that is how it accumulated and I could not save $200 out of my salary.

"Q. Do you know where you got the last $200?

"A. I don't remember how it came to me.

"Q. How did you happen to go—how did you happen to put this lady in bankruptcy?

"A. I asked her for the money and she gave me a note and when the note came due I asked her again, and she said she didn't have it to give to me.

"Q. Now when you asked for this note, is this the paper that was handed to you?

"A. Yes, sir.

"Q. That note is dated, you will see, December 1, and is for $400, payable two months after date. You see that, don't you?

"A. Yes, sir.

"Q. So the loans were made by you prior to that time?

"A. Yes, sir.

"Q. You do not know just exactly when?

"A. No, sir.

"Q. In her schedules the bankrupt's reference to you as a creditor is as follows: Herman Warton, 1653 Bathgate Avenue, Bronx; for money loaned to petitioner on or about December 23, 1922. Is that right?

"A. Money loaned and just for that amount? I gave her money at that time?

"Q. Yes, on or about December 23, 1922?

"A. I do not think I gave her any money in December.

"Q. This is not correct?

"A. I don't say.

"Q. Do you say yours is correct?

"A. I don't remember giving her money in December.

"Q. Then her statement is not correct, is it?

"A. Well, I don't remember giving her. I don't know about her statement.

[fol. 36] "Q. Did you give her any money on or about December 23?

"A. Not in December.

"Q. You look at these two notes, December 1st and October 4th?

"A. October 14th.

"Q. In the same writing, aren't they?

"A. I don't think they are according to my knowledge.

"Q. Did you write out these notes? I am referring to the note of December 1st?
"A. No, sir."

LOUIS H. TRINZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

The Court: Mr. Trinz, the Court advises you that if any question is put to you now, the answer to which you claim will tend to connect you with the commission of a crime or to disgrace you in the eyes of your fellow men, you may decline to answer that question. Now proceed.

Direct examination by Mr. Wolff:

Q. You have been advised of that by myself, have you not, Mr. Trinz?
A. I think I have, yes, sir.
Q. Are you the same Louis H. Trinz, who is described in Government's Exhibit 3 as one of the petitioning creditors in the involuntary petition of Annie Hammer, alleged bankrupt, filed in this court on April 18, 1923, at 3:40 p. m.?
A. I am.
Q. Is that your signature on that petition (handing paper to witness)?
A. It is.
[fol. 37] Q. And did you acknowledge that before a Commissioner of Deeds, or a Notary Public?
A. No, I acknowledged it before some stenographer there.

Mr. Wolff: Well, it is a notary public.

Q. Do you recall, Mr. Trinz, being in the office of Referee Thayer, at Yonkers, New York?
A. I do.
Q. You saw Referee Thayer on the witness stand this morning?
A. I did.
Q. The same man before whom you testified on October 25th, 1923?
A. He is.
Q. Before you began to give your testimony did the Referee administer to you an oath in substance as follows:
"Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?"

Mr. Elder: I object to that as incompetent.
The Court: Objection overruled.
Mr. Elder: Exception.

A. I did.
Q. You mean he did?
A. He did.

Mr. Wolff: I have marked out what this witness is said to have testified to, and I wish your Honor would correct me if I read anything except what your Honor has admitted.

Q. On page 64. I will start with the question—you have heard [fol. 38] the testimony read? I think I can make a blanket question. You have heard the testimony read by the stenographer to the jury while sitting in this courtroom as your testimony, have you not?

A. I did.

Q. As far as you recall, was that testimony read as your testimony this afternoon by the stenographer while you were in the courtroom, the testimony that you gave before Referee Thayer on October 25th, 1923?

Mr. Elder: I object to that as incompetent.

The Court: Objection overruled.

Mr. Elder: Exception.

A. I recollect it as such.

Q. You recollect the question, "You did loan her some money?" And your answer, "Yes, sir." Do you recall that question?

A. I do.

Q. And you recall that answer?

A. I do.

Q. Did you ever loan Annie Hammer any money?

A. No, sir.

Q. I speak not alone at this time, but at any time in your life, did you ever loan her money?

A. No, sir.

Q. Did Annie Hammer ever give you a promissory note in consideration of a loan you made to her?

A. No, sir.

Mr. Wolff: If your Honor please, I offer in evidence the note mentioned in the testimony which is the promissory note described in the indictment.

Mr. Elder: I object to his telling what it is.

Mr. Wolff: Very well, I offer in evidence this proof of claim and the note in question.

[fol. 39] Mr. Elder: Your Honor, I object to his doing that after you telling him not to do so.

The Court: Just offer it without stating what the document is.

Mr. Wolff: It was put in evidence before the Referee.

Mr. Elder: That was an improper remark, if your Honor please.

The Court: Gentlemen of the jury, disregard these statements of counsel; they are improper. They are statements of fact which are not any basis upon which the jury could reach a verdict.

Mr. Wolff: I would like that your Honor pass upon whether my remarks are proper rather than have counsel pass upon it.

The Court: The Court has passed upon it as clearly as the Court knows how. Objection sustained.

Q. Mr. Trinz, I show you a promissory note dated October 14th, 1922.

Mr. Elder: Now, if your Honor please——

The Court: Now I will show you how to try the case, if you want me to. Show the witness the paper and see if he recognizes the paper.

Q. Mr. Trinz, I show you a document, the smaller one of the two, and ask you if you ever saw this document before (handing witness)?

A. I did.

Q. Will you state to the Court and jury the circumstances under which you received that document, and any conversation you had [fol. 40] at the time with the defendant Charles Hammer?

A. This was given to me by Mr. Charles Hammer.

Q. When?

A. As nearly as I can recollect, several days or weeks after I signed the petition in bankruptcy as one of the petitioners.

Q. You signed the petition in bankruptcy on April 19, 1923, is that correct?

A. I can't recollect, I presume so.

Q. I show you the petition (handing witness)?

A. It says here the 17th day of April, 1923.

Q. That date is the day on which you signed the petition in bankruptcy?

A. Yes, sir.

Q. Until after the time you had signed this petition in bankruptcy, had you ever seen that note which you hold in your hand?

A. No, sir.

Q. About how long after the date that the petition was filed was that note handed to you?

A. I think I answered that question, a few days or a few weeks after I signed the petition.

Q. Are you quite certain it was after the time the petition was signed by you?

A. Yes, sir.

Q. You now state you never saw that note before the time you signed that petition?

A. I did not.

Q. Who handed you that note?

A. Mr. Charles Hammer.

Q. Where did he hand you that note?

A. In his place of business on 45th Street.

Q. Is that between Broadway and Sixth Avenue?

A. It is.

Q. On the north side of the street?

A. It is.

The Court: What city?

The Witness: New York.

The Court: What Borough?

The Witness: Manhattan.

[fol. 41] Q. Do you recall the day of the week or whether it was on a week day when that note was signed?

A. It was on a week day because the business places were open. They were all open.

Q. Was it during business hours?

A. I do not think it was the evening, but it may have been the evening. I think that the place was open.

Q. It was after six o'clock?

A. That I cannot say.

Q. Who was present when he handed you the note?

A. I cannot say specifically.

Q. But you know he gave you that note?

A. That I know.

Mr. Wolff: I now offer the note in evidence, if your Honor please.

Mr. Elder: I object to it as irrelevant, your Honor, and incompetent.

The Court: Objection overruled.

Mr. Elder: Exception.

(Paper marked Government's Exhibit 9 in evidence.)

Q. Now will you state to the Court and jury what conversation you had with Charles Hammer at the time when he handed you Government's Exhibit No. 9?

A. No conversation except that he told me to keep it, as far as I can recall.

Q. Now prior to that time that the note was handed to you, did you have any conversation with Charles Hammer respecting an indebtedness between Mrs. Hammer and you, about the time the petition was signed?

A. Mr. Hammer requested me to sign this petition.

Mr. Elder: I object to that as irrelevant and incompetent and move to strike it out.

[fol. 42] Mr. Wolff: I consent the answer be stricken out, and that the witness answer yes or no.

The Court: Yes.

The Witness: Yes.

Q. Will you state what was said between you, what he said to you and what you said to him?

A. Mr. Hammer requested that I sign this petition in bankruptcy for him.

Mr. Elder: I move that the answer to the question be stricken out as incompetent and irrelevant.

The Court: Motion granted. Strike it out. You will have to reproduce his language as nearly as you can recall.

Q. In substance, what was said to you, and as well as you can remember what you said to him?

A. It is a year and a half ago.

The Court: Just do the best you can, and when you are telling us about Mr. Hammer, put it in the first person instead of saying "he," and then duplicate as nearly as you can the statement he made to you.

Mr. Elder: Your Honor, I can shorten this if you will permit me. I withdraw the objection as based upon incompetency and will make it as to irrelevancy so that would obviate——

The Court: With that modification, Mr. Elder, the objection is overruled and you can have your exception. The answer may stand.

Q. Do you recall what he said to you, and you said to him, and in as near the same language as possible? Now who spoke first, you [fol. 43] or he?

A. Mr. Hammer naturally must have spoken first because I knew nothing about this. I think he did speak to me.

Q. What did he say to you as best you remember?

A. It is over a year and a half ago, and I am afraid I can hardly —over a year and a half ago and I do not think my memory is fresh as to all that.

Mr. Elder: Would you kindly request him to answer the question in as few words as possible?

Q. Did he say, "Louis, I want you to sign this petition?"

Mr. Elder: Objected to as leading.

The Court: Objection sustained. Do not lead him.

Q. Mr. Trinz, you do not have to remember the exact words, but you may say what you remember?

Mr. Elder: If your Honor please——

The Court: Do the best you can, Mr. Trinz.

A. In as few words as possible, I was requested by Mr. Hammer to sign this petition in bankruptcy for him, the wording I certainly can't remember this day, it was over a year and a half ago.

Q. Mr. Trinz, don't you realize that the petition was signed in April, 1923?

A. It is a year ago.

Q. Did you state that up to that time you knew nothing about it?

A. I knew nothing about it.

[fol. 44] Q. Did you tell him so, that you knew nothing about this debt?

A. I do not think the question was even asked as far as I can recollect. I knew nothing about this case.

Q. Who asked you to do it?

A. Mr. Hammer.

Q. Did Hammer owe you anything?

A. No.

Q. Did you ever loan her anything?

A. No.

The Court: Mrs. Hammer.
The Witness: No.

Q. After the occasion of the signing of the petition, did you have any conversation with Charles Hammer?
A. No, the matter was just dropped; I forgot all about it.
Q. When is the next time you spoke to Mr. Hammer regarding the bankruptcy of Annie Hammer?

Mr. Elder: Your Honor, he has just said there was no other time.
The Court: Did you ever speak to Charles Hammer again on the subject?
The Witness: Not until I was subpoenaed to appear before the Referee in Yonkers.
The Court: What conversation, if any, did you have with him then, tell the jury?

A. At that time I consulted him on the telephone, telling him I had been subpoenaed to appear before the Referee and asking his advice.
Q. What did he say and what — you say? State what the conversation was?
A. I don't recall the answer exactly but I think he phoned me again to let me know that I was to appear before some lawyer downtown the following morning who, of course, as used to assure me [fol. 45] that everything would be all right.
Q. Did Mr. Hammer send you to that lawyer?
A. He did; as a matter of fact he accompanied me there.
Q. Mr. Hammer took you to the lawyer's office?
A. Yes.
Q. Where was that lawyer's office located, do you remember?
A. In this vicinity, in Broadway.
Q. Was it Mr. Stutsky, or Mr. Gerber?
A. First I went to Stutsky's office.
Q. Do you know that Mr. Stutsky was the attorney in this bankruptcy proceeding?

Mr. Elder: Objected to as incompetent.
The Court: Sustained.

Q. What was said in Mr. Stutsky's office in your presence and in the presence of Mr. Hammer?
A. In as few words as possible, the matter was gone over, and an attempt was made to assure me that I had nothing to worry.

Mr. Elder: I object to that statement.
The Court: Sustained.
Mr. Elder: I move to strike the answer out.
Mr. Wolff: I will consent.
The Court: Motion granted.

By the Court:

Q. What was said by the different parties at that interview, in the presence of the defendant?

Mr. Wolff: If your Honor please, I will lead him as to that.
[fol. 46] Mr. Elder: No, no, I do not want any leading.
The Court: Be careful not to put leading questions.
Mr. Wolff: I will try my utmost.

Q. On October 15th, 1923, did you receive any paper in this bankruptcy proceeding?
A. On October 15th, 1923? I think that was the time I was subpœnaed to appear before some Referee in Yonkers.
Q. Was it at that time you telephoned Mr. Hammer?
A. That was the time.
Q. And was it about that time when you went with Mr. Hammer to Mr. Stutsky's office?
A. No, it was the following morning.
Q. When you got to Mr. Stutsky's office, did any conversation take place?
A. Yes.
Q. Try to tell the Court and jury in as nearly the exact language as you can, what was said by you, Mr. Stutsky and Mr. Hammer?
A. I cannot say word for word, but I can give you generally about that; that I was very much upset about it.

Mr. Elder: Objected to.
The Court: Just what you said, not how you felt.
The Witness: It is impossible for me to repeat the language of what was said.
The Court: Repeat as nearly as you can the language of the different parties to the conference.

By Mr. Wolff:

Q. Where is the office located?
A. In this vicinity, somewhere, on Broadway, I do not know the number. In the Park Row Building.
[fol. 47] Q. Was there any discussion regarding your testimony?

Mr. Elder: No, no, I object.
The Court: The Court holds that is competent as far as it has been put; exception to the defendant.

Q. Was there any discussion in regard to your testimony to be given by you before the Referee, at Stutsky's office that morning?

Mr. Elder: I object to that as incompetent.
The Court: Objection overruled.
Mr. Elder: Exception.

A. There was discussion.
Q. And who was present at that discussion?
A. Mr. Stutsky, Mr. Hammer and myself.

The Court: Do you remember anything there that Mr. Hammer said at that time?

The Witness: Not word by word.

The Court: In substance.

The Witness: In substance I can say.

Q. Tell us what Mr. Hammer said?

A. In substance the statement was inasmuch as I was so much upset I was not to worry, everything would be all right, merely to go before the Referee and answer the questions as well as I possibly could, and say I do not know, or words to that effect.

Q. Did you on that occasion tell him that you were worried about?

[fol. 48] Mr. Wolff: He has so testified.

Mr. Elder: Objected to.

The Court: It is leading. Sustained.

Q. Mr. Trinz, how long do you know the Hammers?

A. More than three years.

Q. Until this occasion you have been very frequently with them, haven't you?

A. Very.

Q. Did Mr. Stutsky take any part in this conversation at his office?

A. He also assured me there was nothing to worry about and to appear before the Referee and everything would be all right.

Q. Did Mr. Stutsky advise you what your testimony should be?

Mr. Elder: I object to that as incompetent.

The Court: Do you object as calling for a conclusion? It is competent.

Mr. Elder: No, only that it is suggesting the answer to the witness. If he has a recollection he ought to be able to tell the jury what was said.

Q. Mr. Trinz, what was the first thing that was said when you came into Mr. Stutsky's office that morning?

The Court: That you remember.

Q. The first thing you remember.

A. I only recall that he was on the telephone. I really can't say exactly what happened, the conversation.

Q. Well, what is the first thing you remember?

A. I cannot truthfully tell you because I was very much upset.

[fol. 49] Q. Do you remember anything?

A. I remember the substance of the conversation which I quoted.

Q. What is the first thing you remember of the substance of the conversation?

A. Undoubtedly when Mr. Hammer presented to Mr. Stutsky my nervousness and fear for going through with this witness subpoena, and what was the general conversation you might lead from that.

Q. Did you tell him why you were afraid to go through with it?

A. I stated probably, I don't recall the words, that I did not like the whole matter; I did not like anything about it at all, and was very anxious to get cleaned up as quickly as I possibly could.

Q. Did you tell him you did not want to testify?

A. I did.

Q. Were Mr. Stutsky and Mr. Hammer present at the time?

A. They were.

Q. And who spoke to you first, if you remember, Mr. Stutsky or Mr. Hammer?

A. I cannot—

Q. Do you remember M. Stutsky saying anything to you at all in Mr. Hammer's presence?

A. I did say that they advised me about not worrying and to answer questions as well as I could up there, and to keep saying I do not know. That is as far as I can recollect of the entire transaction.

Q. Did you go to any other lawyer's office with Mr. Hammer?

A. From there we went to Mr. Gerber, a lawyer on Broadway.

Q. Have any conversation there in the presence of Mr. Hammer?

A. Conversation ran along the same lines, and he further assured me that everything was all right and not to worry.

Q. Who?

A. Mr. Gerber.

[fol. 50] Q. Did Mr. Hammer take any part in the conversation?

A. There was general discussion.

Q. What was the discussion, Mr. Trinz?

Mr. Elder: No, I object to this, if your Honor please.

The Court: Yes, think.

A. The matter was taken up, I had been very much afraid, very much annoyed—

Q. Did you state why you were annoyed to Mr. Gerber and Mr. Hammer?

A. Well, it was quite evident; I had been subpœnaed and I was annoyed at that. I did not care to go up and testify. I did not like the whole matter.

Q. Did you tell them at the time that you did not like to go up there?

A. Of course, I did not want to be mixed up in anything of that kind.

Q. Did you tell them why you did not want to be mixed—

A. No reason at all, only I was not able to—

Q. What I asked you was, did you tell them why you did not want to get mixed up in this matter?

Mr. Elder: Your Honor, I must object to these questions. This witness belongs to the prosecution. He asked what was said. I object to any of these questions—they are cross examination.

The Court: The Court believes that the Court is entitled to ask this question of the witness: Do you desire to testify for the Government in this matter, or are you here against your wish?

The Witness: I am here and desire to testify for the Government.
[fol. 51] The Court: You are?
The Witness: Yes, sir. This is a matter six months ago; I cannot tell everything verbatim.
The Court: What is your business?
The Witness: Advertising man.
The Court: How long have you been in business?
The Witness: About ten years.
The Court: How old are you?
The Witness: Twenty-nine.
The Court: Can you now recall what took place in Mr. Gerber's office?
The Witness: Yes, I have told you what I remember.
The Court: Just tell the jury.
The Witness: I am trying to think in a general way what took place. He went to this man's office with the apparent intention of persuading me not to be afraid or frightened, and to go right ahead and keep testifying. Everything was all right.
Mr. Elder: I ask that all that answer be stricken out.
The Court: Motion granted. Just state, if you remember, what was said, if you can remember what was said.
The Witness: I did, I cannot say verbatim the conversation.
The Court: Was anything said about your having committed perjury when you signed the petition in bankruptcy? You told us here today you had no claim against this estate and that you signed the petition saying you had. Was anything said about that?
[fol. 52] The Witness: Yes.
The Court: Tell the jury what was said about it.
The Witness: I was subpœnaed by the Yonkers referee, and we went down there to find out what I should do. I was entirely at a loss and I wanted to get out of this thing.
Mr. Elder: I move to strike that out.
The Court: Motion granted. Just tell us what you said not what you thought, when you went down there to Mr. Stutsky's office or Mr. Gerber's.
The Witness: I said I did not care about this; that I should never have gotten into it; it was not my intention. I did not think I had done such a wrong and I wanted to get out of it as quickly as possible and did not want to testify, and I was pacified and assured that everything would be all right, merely go up there and answer a few questions, and that would be the end of it.
Mr. Elder: I move to strike out after "then I was pacified and assured everything would be all right."
The Court: You want it all stricken out?
Mr. Elder: Well, after the words, beginning, "I was pacified."
The Court: Stricken out.

Q. Mr. Trinz, you say your recollection is somewhat faulty about what occurred?
A. I know the occurrence, Mr. Wolff, but I do not know the conversation that took place word for word.

Q. Did you sign a statement of your transactions in this matter at my request?

A. I did.

[fol. 53] Q. I show you the statement and ask you if your signature appears at the bottom (handing paper)?

A. It does.

Q. Now I ask you whether, if you read that statement, it would refresh your recollection as to these transactions?

A. It might.

Q. Read it carefully then.

A. Read it aloud?

The Court: No, to yourself. Have you read the statement?

The Witness: Yes.

The Court: Is your recollection refreshed?

The Witness: Yes, but it does not emphasize anything further than what I said, that I was told by Mr. Hammer and Mr. Stutsky.

The Court: Was anything said by the defendant Hammer with relation to the testimony that you were to give up at the Referee's office?

The Witness: Yes.

The Court: Then tell us what was said about that?

The Witness: I was told to go up to the referee and not to worry.

The Court: That is what Hammer told you?

The Witness: I was just to go up to the referee in Yonkers and testify, and state that I did not know exactly, or something, but money was loaned to me and so forth, or her, I did loan money to her.

Q. What was that last?

A. I was told not to worry and to state that I did not know when the money was loaned to Mrs. Hammer by me, and I did not know it particularly.

[fol. 54] Q. Do you remember he told you to state that you did not remember when the money was loaned by you to Mrs. Hammer?

A. I think he did, yes.

Q. Words to that effect?

A. Yes.

Q. Did he say anything regarding your testimony if you were asked regarding when you had made this loan?

A. Well, in general he said I was to say I gave money at various times and I did not know exactly the date and so forth.

Q. And did he tell you to say that you had gotten this note before the petition was filed in bankruptcy?

A. No, he did not tell me anything about that matter as far as I can recollect.

Q. But he gave you the note, did he not?

A. He gave me the note.

The Court: Where did he give you the note?

The Witness: In his place of business.

Q. That was after the time the petition was filed?
A. Yes, sir.

Cross-examination by Mr. Elder:

Q. Now you said that you were to go up there and testify—are you listening?
A. Yes, sir.
Q. You said that Mr. Hammer said that you were to go up there and testify and say that you did not know when you loaned the money?
A. Yes, I did.
Q. And you said, "I think he did," didn't you?
A. I cannot recall my answers.
Q. After you stated right here on the stand that Mr. Hammer had said that to you, did you not add, "I think he did"?
A. The minutes would show that.
[fol. 55] Q. Well, what does your recollection show about it?
A. My recollection is this, that I said I think he did, and probably I had reference to the words that he used. I am not sure.
Q. You are not sure then whether he said to you actually that you were to say that you did not remember when the loans were made?
A. I know something to that effect was said but I do not know the words.
Q. What was said about you did not remember whether he said so or not?
A. I do remember he said it.
Q. Then why did you say "I think he did."
A. I am a very poor witness, I imagine. I do not know.
Q. Well, now, before that you said that somebody had said to you to go up there and answer the questions as well as you could and say you did not remember. Do you remember saying that?
A. Something to that effect, yes.
Q. Was it Mr. Hammer or Mr. Stutsky, or Mr. Gerber said that to you?
A. Words to that effect, all told me, about all three.
Q. All at once, or each speak apart?
A. Each speaking apart.
Q. Did you try to borrow money of Mr. Hammer?
A. I did not.
Q. Did you ask him to loan some money to a friend?
A. Yes, I did.
Q. Didn't you testify before the referee——
A. I don't recall the time.
Q. Was it since you signed the petition in bankruptcy?
A. I cannot say definitely.
Q. Did he decline to loan the money?
A. He did.
[fol. 56] Q. And was the loan you wanted ten thousand dollars?
A. I did not want any money.

Q. Was the amount ten thousand dollars?
A. It was that amount, I believe, yes, sir.
Q. Was that before you went to the United States Attorney's office?
A. It was.
Q. Now, don't you remember that it was since?
A. Pardon me, the United States Attorney's office—meaning here?
Q. Yes.
A. It was before, yes.
Q. Now don't you remember that it was since you testified before the referee?
A. I do not remember that at all.

Redirect examination by Mr. Wolff:

Q. Mr. Trinz, did you go to the United States Attorney's office pursuant to a request?
A. I did.
Q. You received a subpœna, did you not?
A. I did.
Q. Did you have a talk with Mr. Hammer after you got the subpœna from me?
A. I did.
Q. What talk did you have with Mr. Hammer regarding that subpœna?
A. You mean prior to seeing you?
Q. Yes.
A. I remember I was at Mr. Hammer's place of business, and he——

Mr. Elder: I object to this, if your Honor please, on the ground that it is incompetent and irrelevant. Is this an attempt to show something not outlined in the indictment?
Mr. Wolff: It is not.
Mr. Elder: It is irrelevant.
The Court: Overruled.
[fol. 57] Mr. Elder: Then if it is of no value tending to impeach the credibility, it is incompetent and irrelevant.
The Court: It is allowed on the theory that the Court supposes it is going to reveal some reference to the transaction with which the defendant is charged, if not, it will be stricken from the record.
Mr. Elder: I except.

Q. When did you tell the defendant that you got a subpœna from me?
A. At his place of business that evening; he sent for the subpœna, which was mailed to my home. He had a memorandum of his conversation. He consulted with Mr. Stutsky or Mr. Gerber but whom I do not know which. I saw him that evening and he again told me not to worry; I was merely to repeat my previous statement. Everything was all right. And to assure me that it will be and to put some confidence in me, he called Mr. Stutsky on the phone and his lawyer spoke to me on the phone to repeat the statement along those lines.

Mr. Elder: Now, your Honor, I move all of this answer be stricken out. What is this, an attempt to suborn a witness to testify falsely before the Grand Jury or in the District Attorney's office, or on this trial?

The Court: Motion granted.

Mr. Wolff: I will tell your Honor the reason why I asked it. Just as an admission against interest. Any statement that the defendant makes which would tend to show an admission of crime even if it was done at this moment would be admissible against him.

[fol. 58] The Court: He said, "Everything would be all right." That is all he said.

Mr. Wolff: He said, to repeat his former testimony.

The Court: Motion granted.

Mr. Wolff: I won't press it.

The Court: Can't you tell us, Mr. Trinz, when it was that you asked this defendant to loan a friend of yours ten thousand dollars? Can you give us any idea?

The Witness: It was not exactly a loan. I asked him to interest himself in this man's business to that amount.

The Court: When?

The Witness: I was asked whether it was prior or after being subpœnaed before the Referee. I can not say. I think it was. I know it was not in the Winter time, it was Spring or Summer, but I can't recall.

Q. You say you have an idea it was last Fall?

A. Yes, apparently it has been before that I appeared before the Referee.

By Mr. Wolff:

Q. Mr. Trinz, was this loan you sought to make for yourself?

A. This was not for myself.

Q. Did you seek him to loan you the money?

A. No, sir.

Q. Or to purchase an interest in the business?

A. Absolutely had nothing to do with me whatsoever.

Q. And you expected to gain no benefit out of it?

A. Absolutely none.

[fol. 59] Q. Was it because that transaction didn't go through you came here to testify?

A. Absolutely not.

Q. Have you any animosity against the defendant Charles Hammer?

A. Absolutely none.

By Mr. Elder:

Q. What was this business?

A. This man was in the dress business.

Q. Didn't you have an interest in that business?

A. I did not.

Q. Didn't you expect to have an interest in it?
A. I did not.
Q. But this gentlemen who had the business was simply a friend of yours?
A. That is all.
Q. And you were trying to get an accommodation for your friend, weren't you?
A. That is all.
Q. And how long had he been your friend?

Mr. Wolff: I object as to how long this third party had been Mr. Trinz's friend.
The Court: Overruled.

A. The past year or more.
Q. Is he still your friend?
A. He is.
Q. Did you say you got a subpœna to go to the United States Attorneys office?
A. I did, in the mails.
Q. Before you got that subpœna, you had been down there, hadn't you?
A. I was not.
Q. Before you got the subpœna, you had talked with somebody connected with the United States Attorney's office, hadn't you?
A. I did not.
Q. Now your memory is pretty good on that, is it?
A. Possibly.
[fol. 60] Q. Well, have you a friend in the United States Attorney's office?
A. I have.
Q. A personal friend?
A. He is.
Q. Did you talk to him about these matters?
A. I did.

By Mr. Wolff:

Q. When was the first intimation that anybody in the United States Attorney's office wanted to see you, what was the first intimation you got?
A. I received from you I think a subpœna.
Q. And previous to that time had any representative of the United States Attorney's office spoken to you?
A. None.

The Government rests.

ARGUMENT OF COUNSEL

Mr. Elder: Now, if your Honor please, I move that your Honor direct the jury to find a verdict of not guilty on the first count in the

indictment upon the ground that there is no evidence whatsoever that would show that this defendant suborned Annie Hammer to testify to anything whatsoever.

The Court: I suppose that is true, isn't it?

Mr. Wolff: That is true.

The Court: Motion granted.

Mr. Elder: I request your Honor to direct the jury to find a verdict of not guilty on the third count in the indictment on the ground that there is no evidence whatsoever tending to show that this defendant suborned Mr. Warton.

The Court: I suppose that is true?

Mr. Wolff: Certainly.

The Court: Motion granted.

[fol. 61] Mr. Elder: Now I request your Honor to direct the jury to find a verdict of not guilty on the ground——

Mr. Wolff: What ground?

Mr. Elder: There is only one left.

Mr. Wolff: Specify it.

The Court: Go right ahead.

Mr. Elder: On the ground that the prosecution has not made out a prima facie case against this defendant on any count in the indictment.

The Court: Motion denied. I do not care to hear argument, Mr. Elder. State the ground of your motion and then take your exception to the denial. I do not care to hear argument.

Mr. Elder: I do not want to argue it, if your Honor has decided, but I would like to get enough reasons in there to make my exception good.

The Court: Oh, yes, you may do that. Take five minutes to put on the record what you wish.

Mr. Elder: I won't take that long. On the ground that this is an indictment for subornation of perjury, and there is the testimony of but one witness here in which it is alleged the perjury arose. The law requires that there should be the testimony of one direct witness with corroborating circumstances, and that there are no corroborating circumstances.

Secondly, on the ground that the evidence is insufficient because the only direct evidence is furnished by the witness Trinz, and that [fol. 62] his testimony is not clear cut and effective as in itself to constitute proof that perjury was suborned by this defendant.

Upon the ground that there is no evidence to show that this defendant knew that the testimony that this witness would give would be perjured testimony.

Upon the ground that the prosecution has wholly failed to make out a case if this is to be a prosecution for subornation of perjury.

Now, if your Honor please, I move that your Honor direct a verdict of not guilty and also move that your Honor dismiss this indictment on the ground that it appears without dispute in the evidence that this alleged false swearing occurred in a proceeding in bankruptcy, and that that is not perjury under the United States statutes. It might be a violation of Section 29 of the Bankruptcy

Act, but that is not perjury, and that therefore, for false swearing in a bankruptcy proceeding there can be no prosecution for perjury. There is no such crime as subornation of perjury based upon false swearing in violation of Section 29 of the Bankruptcy Act.

The Court: Has the matter ever been the subject of adjudication by the courts?

Mr. Elder: I think it has been decided by the Circuit Court of Appeals in this circuit as well as in others.

The Court: Will you give me the authorities; I will send for them at once.

Mr. Wolff: I will give your Honor the authority.

The Court: No, no.

Mr. Elder: Rosenthal v. United States, 248 Federal, Kahn v. United States, 214 Federal, Olney v. United States, 219 Federal.

[fol. 63] Mr. Wolff: Epstein v. United States, 196 Federal, 354, United States v. Thompson, 31 Federal, 331.

Mr. Elder: Of course, I have not argued these because your Honor told me you did not want to hear argument and I respect your Honor's wishes, but it will give me a great deal of pleasure to elucidate this class of charge.

The Court: If necessary, you will have all the opportunity in the world later on. Motion denied. Proceed, Mr. Elder, if you please.

Mr. Elder: No.

The Court: The defendant rests?

Mr. Elder: Yes, sir. Now I renew my motion to direct a verdict upon the ground the prosecution has not made out a case and I move to dismiss the indictmest on the ground that it does not state any crime of perjury or subornation of perjury, and I move that your Honor direct the acquittal of the defendant upon the ground that this alleged false swearing was in a bankruptcy proceeding and cannot be prosecuted under the perjury statute.

The Court: Motion denied.

Mr. Elder: And that no case has been made out as to false swearing and no case as to subornation has been made out.

The Court: Motion denied.

Mr. Elder: Exception.

The Court: How long will you take to sum up, Mr. Elder?

Mr. Elder: I am not going to sum up. This is not a jury case, if your Honor pleases.

[fol. 64] The Court: Very well. How long do you want to sum up, Mr. Wolff?

Mr. Wolff: Fifteen minutes. I understand Mr. Elder is now foreclosed from summing up?

The Court: Yes, Mr. Elder is now foreclosed from summing up.

Mr. Elder: May I ask an exception to all of those rulings, your Honor?

The Court: Yes, if you find you did not take them, there is an exception given to each ruling of the Court adverse to the defendant.

(Mr. Wolff summed up the case to the jury on behalf of the Government.)

(During the summation of Mr. Wolff the following took place):

Mr. Elder: I object to this, if the Court please.

The Court: On what ground?

Mr. Elder: Prejudice. It is not incumbent upon the defendant to call a witness. He is not to be subjected to criticism for not having done it.

Mr. Wolff: I am not stating anything about the defendant's lack of taking the stand.

The Court: Now the Court will rule that the defendant is not required to take the stand, and no inference negative to him in the slightest degree may be taken by the jury as a result of such failure. The Government is required to prove its case beyond a reasonable doubt that he is the party who committed the crime. The jury is entitled to draw any unfavorable inference against either party to a prosecution which they think it warranted by reason of a failure [fol. 65] of a party to present to the jury the testimony of any witness, with the exception of the defendant, whose testimony would elucidate the matters in issue between the parties.

Mr. Wolff: I haven't endeavored to criticise, I have not mentioned anything about the defendant not taking the stand.

The Court: Yes, the court did not so understand.

Mr. Elder: May we have all of this part taken down? Because I object to it, your Honor. I object to it because there is no obligation on the part of the defendant to call any primary or any other witness in the whole world, and he is not to be criticised because he did not.

The Court: Do you agree with Mr. Elder upon that proposition?

Mr. Wolff: I certainly do not, sir.

The Court: The objection is overruled, and the absence of any primary witness on the stand may be commented on by the attorney for the United States Government.

Mr. Elder: I except.

Mr. Wolff (addressing the jury): It is quite obvious, gentlemen, that Annie Hammer could enlighten you as to whether or not she received the money from Trinz. Who in the world would know better. She received the money from Trinz. Who would know better than she whether she signed that note and whether she gave it to him? That note dated back months before the petition in bankruptcy was signed and filed. Who signed and filed, to foist that note [fol. 66] upon the referee in bankruptcy and the creditors in that bankruptcy proceeding. That note that Trinz did not see until after the petition in bankruptcy was signed and filed. Why did they give him this note? This accurate mind of Hammer's sought to evolve something to explain the situation which had been created.

They were panic-stricken. They ran to two lawyers. Now the statements in evidence may show you that Gerber was the lawyer for the petitioning creditors and that Stutsky was the lawyer for the bankrupt, Annie Hammer.

And what a strange proceeding it was that Mr. Charles Hammer should accompany Trinz first to Stutsky's office and then to Gerber's office—adverse interests protecting the creditors.

Mr. Elder: I object to this, your Honor, there is no evidence here of any situation disclosed which indicates adverse interests under the Bankruptcy Act. Anybody can go into bankruptcy.

The Court: I did not think that was in this case.

Mr. Wolff: There are documents in evidence which show Mr. Gerber, the attorney for the petitioning creditors. They are in evidence.

The Court: Mr. Elder states that adverse interests have not been disclosed. You have only to satisfy the jury with the proof that this defendant instigated this man to go on the witness stand and swear falsely. You can get at that very quickly.

Mr. Wolff: Very well. I do not intend to argue long against myself. I just want to point out, gentlemen, a few simple facts. [fol. 67] In the first place, the witness Stutsky was seated in the courtroom and heard the testimony given by Trinz; testimony very damaging to the defendant. Why didn't he take the witness stand?

Mr. Elder: I object to this, your Honor, and I ask that the jury be charged to disregard it. There is no evidence in this case that Stutsky is seated in the courtroom, and even if he were——

The Court: Objection sustained. Disregard it, gentlemen.

Mr. Wolff: The minutes show, the stenographer's minutes show that Mr. Stutsky is counsel for the defendant. I saw it on the stenographer's minutes.

Mr. Elder: Do you write shorthand?

Mr. Wolff: Yes, I do. Gentlemen, regardless of whether or not Stutsky is in this courtroom, it has been shown that there was no effort by the defendant to procure the attendance of Stutsky to contradict what Trinz said on the witness stand. That is obvious to you.

Now just for a brief review of what testimony was given. Unquestionably you are satisfied in your minds that there was an oath administered by Referee Thayer. Now undoubtedly you are satisfied that there was never a loan made by Trinz to Mrs. Hammer. You must be satisfied from the testimony and evidence given to you, from the note and from the documents in evidence, that Trinz was induced, procured and counseled by this defendant to go to that Referee's office first for the purpose of swearing falsely to that peti- [fol. 68] tion, and then to follow it up he gave him that fictitious note, a note to substantiate the loan, but which in your minds must rule as clearly and convincingly as possible that this loan was never made. And lastly, something which I cannot substitute for you, but which I ask you to do in going to the juryroom, is the manner of Trinz. That he has made one misstep. You have it before you, a man who has made a clean breast of everything that ever was done by him. Thirty years of age, I believe he said he was; married, and in the advertising business. He knew these people for three years. He felt friendly towards them, has no animosity against them.

They tried to make you believe that Trinz tried to get $10,000 from this poor Mr. Hammer; but I assure you gentlemen that if they had any evidence tending in the slightest way to substantiate that Trinz tried anything improper with regard to such a thing, that the astute counsel for the defendant would not have overlooked such material. You know he would not.

It was first described as a loan, first it was described as a loan to Trinz, and then you find that it was neither a loan, and that it would not benefit Trinz. They wanted to create the impression by inference, just by inference, that Trinz was trying to get $10,000 and that was why he came down to the District Attorney's office. You do not believe that Trinz tried to do that, but you must believe that an impression was attempted to be created, to foist upon you something that never happened.

[fol. 69] You see the defendant sitting here. Compare him with Trinz.

Mr. Elder: What, physically, or the color of his hair, or how do you mean?

Mr. Wolff: I have nothing to state.

Mr. Elder: I object to that.

The Court: I regret your doing that. Do not make up comment which is just as improper as Mr. Wolff.

Mr. Elder: I do object to any attempt to make physical or psychological or other comparisons between the defendant and the witness.

The Court: Objection sustained.

Mr. Wolff: If your Honor please, I submit that the defendant is always an exhibit in the case. That his personal appearance is always required during the trial.

Well, gentlemen, regardless of all interruptions, regardless of the false impression that has been attempted to be created, when you go into your juryroom you have one conclusion left, and that is that Charles Hammer procured Louis Trinz to violate his oath and testify falsely.

Mr. Elder: I just wanted to make sure that I noted an exception there where——

The Court: Let an exception appear there.

Mr. Elder: Where I objected to the comment in reference to Annie Hammer.

The Court: Yes.

[fol. 70] CHARGE OF THE COURT TO JURY

GARVIN, J.:

MR. FOREMAN AND GENTLEMEN OF THE JURY: This case which seemed to be somewhat complicated as it was first presented, has resolved itself into a comparatively simple issue.

As now to be submitted to you, the Government has charged that the defendant, Charles Hammer, husband of Annie Hammer, procured or induced Louis H. Trinz to testify falsely as a witness in the bankruptcy proceedings of Annie Hammer, before Referee Thayer at Yonkers.

The particulars under which this claim that Hammer, the defendant, procured Trinz to testify falsely arose, and in which it is alleged that he did induce Mr. Trinz to testify falsely, are these:

It is claimed by the Government that Annie Hammer never borrowed any money from Louis Trinz, and that Louis Trinz never loaned her any money, and that she did not, prior to April 18th, 1923, sign, execute and deliver to Trinz a promissory note for the sum of $500.

It is claimed by the Government that the Government has proved that Louis Trinz testified that prior to April 18th, 1923, he loaned to Annie Hammer and she borrowed from him the sum of $500 or some other sum. That prior to April 18th, 1923, he, Louis Trinz, received from Annie Hammer a promissory note for the sum of five hundred dollars, signed, executed and delivered. It is claimed that he so testified.

It is claimed by the Government that the testimony was false; that she knew it was false when he gave it, and that he committed perjury, Louis Trinz. But that before he committed perjury the [fol. 71] defendant on trial had procured him by persuasion, inducement or some other motive, to do as the Government claims it has proved he did, namely, commit perjury in these matters, which were material matters, before the Referee in Bankruptcy, Mr. Thayer.

Now it is for you, gentlemen, to determine whether the Government has proved every element, every material element, in this charge against the defendant on trial, Hammer. First of all, it should be understood that this indictment is no proof whatever against the defendant, it is but the customary manner of preferring a charge against him which must not be taken into consideration by you when you come to determine whether or not his guilt has been established.

Furthermore, the defendant in every criminal trial has the presumption of innocence, that presumption of innocence is as though he had entered the trial, having produced before you evidence of his innocence, which evidence must be overcome by the Government through the production before you of testimony which not merely overcomes the presumption of innocence which establishes to your satisfaction the guilt of the defendant beyond a reasonable doubt. It is not necessary that the Government should prove the defendant's guilt to an absolute certainty, but, if after you have considered the case when it is finally submitted to you, no one of you gentlemen of the jury is able to advance any doubt for which he can give a reason that appeals to human intellect, then you have met the test which is required and which would justify you in bring- in a verdict of guilty.

You must not in the case, gentlemen, allow the fact that the [fol. 72] defendant has not taken the stand to testify in his own

defense to influence you against him, to arouse prejudice among you against him, nor must you permit yourselves to infer, by reason of his failure to testify in his own behalf, any conclusion which would be unfavorable to the defendant. There is nothing more strongly set forth in our system of jurisprudence than that the defendant is not required to offer himself as a witness, and that no unfavorable inference from his failure to give testimony in his own behalf can be drawn.

You must limit your consideration of the case, gentlemen, only to the testimony that has been produced before you, and on the exhibits which have been received in evidence. You must eliminate from your minds all of the episodes which have characterized the trial and which were not part of the evidence as presented; that is, the testimony of witnesses or the exhibits received. All coloquy of counsel or discussions with the court or rulings by the court must be dismissed absolutely from your mind. They are no part of the evidence taken here and they must not be permitted to influence you either for the government or for the defendant.

If you or any of you have come to the conclusion that the court has an opinion with respect to the defendant's guilt or innocence, that opinion, if you believe the court entertains it, must not be allowed to weigh with you in the slightest degree in your determination of this issue, because the responsibility of determining the guilt or innocence of the defendant is for the jury, and for the jury alone.

You are entitled, gentlemen, to weigh and must weigh the testi- [fol. 73] mony of every witness carefully. You are entitled to examine into the testimony to ascertain whether a witness has any motive in testifying, to see whether you find he has any bias, and if you conclude that either one or both of these exist, and his testimony has been affected to such a degree as to make it unreliable, then you may take all of that into account. If you conclude that a witness has wilfully testified falsely to any material fact you may disregard not only that testimony which you find to be false, but any and all of the testimony given by him, if you so conclude. If you find that a witness has attempted to testify truthfully before you, when his testimony is so inherently improbable as to cause any reasonable man to reject that as unworthy of belief, then, gentlemen, you may treat the rest of his testimony with such doubt as you believe is justified by any such circumstances, if you find them to exist.

The crime with which the defendant is charged is serious in character. Upon the maintenance of high standing of judicial proceedings throughout the country depends to a great extent the confidence of the people that live in this country, and the form of government under which we live, and it is of utmost importance that every effort should be made to prevent false swearing or the procurement of false swearing in any judicial proceeding. So much for the importance of the case to the government.

The crime of which the defendant is charged is serious to the government and serious to him as an accused, and you must not be quick to find him guilty merely because the charge is one that is

revolting to an honest man, but on the contrary you must be careful [fol. 74] to determine whether or not the evidence presented is sufficient to establish his guilt beyond a reasonable doubt, and if you find such evidence has not been presented, whatever may be your opinions as to the guilt or innocence of the accused on trial, if you find that the guilt has not been established here then your verdict must be not guilty.

I am sure gentlemen, you will give this case the careful consideration which its importance deserves.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Has the defendant any exceptions to the charge, Mr. Elder?

Mr. Elder: Yes, your Honor.

The Court: Will you record them please?

Mr. Elder: I request your Honor to charge that the case against the defendant is that he procured friends to testify falsely in bankruptcy proceedings before Referee Thayer in Yonkers. He is not charged with that offense, and I request your Honor to charge that the accusation is subornation of perjury which is a rather more serious business than testifying falsely before the Referee.

The Court: Yes, the indictment covers the charge of subornation of perjury, and it refers to the Act of Congress of July 1st, 1898, Section 29-c, and that section I take it is in the Bankruptcy Law.

Mr. Wolff: I understand also Section 126 of the United States Criminal Code.

The Court: But it is subornation of perjury?

Mr. Wolff: It is tantamount, I believe, to the Epstein case which explains exactly why the two sections are applied in this indictment.

Mr. Elder: If your Honor please I except then.

[fol. 75] The Court: You have no objection then to the subornation charge?

Mr. Wolff: I would rather that you left the charge as set forth in the indictment.

The Court: Motion granted. I charge as requested on motion of the defendant.

Mr. Elder: I request your Honor to charge the jury that while it is important in our system of government to prevent false swearing, as your Honor has said, it is just as important to make sure that *-ne* defendant should be convicted upon evidence that is so flimsy as not to prove guilt beyond a reasonable doubt.

The Court: I so charge; but I do not intend to suggest that there is that lack of evidence in this case. It is for the jury to determine whether the evidence is lacking.

Mr. Elder: I ask your Honor to charge the jury that if they decide that the word of Trinz is not sufficient in itself to carry conviction beyond a reasonable doubt, they must acquit in this case.

The Court: I so charge.

Mr. Elder: I request your Honor to charge the jury that in determining whether the word of Trinz is worthy of belief beyond a

reasonable doubt, they have a right to consider that he admitted here on the stand that he had been guilty of false swearing.

The Court: I so charge.

Mr. Elder: That he had endeavored to procure a loan for a friend from the defendant in the sum of $10,000 and had been disappointed in procuring it.

The Court: I will direct that you take into consideration the testimony with respect to his submission to the defendant of that request.

[fol. 76] Mr. Elder: Following upon his perjury.

The Court: I so direct.

Mr. Elder: Also the manner in which he testified.

The Court: I so charge.

Mr. Elder: And all of the circumstances that would help out in showing whether or not he is such worthy witness or not.

The Court: I so charge.

Mr. Elder: I request your Honor to charge the jury that this crime charged being subornation of perjury, that they cannot find the defendant guilty upon the testimony of Trinz uncorroborated or independent of facts and circumstances which tend to show that the testimony which he gave or says he gave before Referee Thayer was false.

Mr. Wolff: May I answer that, if your Honor pleases?

The Court: Yes.

Mr. Wolff: If your Honor please, there is a rule I understand, your Honor will note that in this court——

Mr. Elder: I think if we are going to have an argument it ought to be——

The Court: An accomplice need not be corroborated.

Mr. Elder: It is not a question of an accomplice. I except to that. I do not want your Honor to be misunderstood in this. This is not a question of an accomplice. It is the old common law rule, that in perjury and subornation of perjury, the testimony of one witness that the alleged subject matter of the perjury was false is not sufficient. The old rule was that there had to be two direct witnesses to the falsity of testimony. That has been modified by modern [fol. 77] decisions, and now they say there has to be one direct witness to the falsity of the testimony and corroborative circumstances which tend to support it.

Now I request your Honor to charge that unless there be such independent corroborative circumstances in this case then the jury must find the defendant not guilty.

The Court: We are agreed, but you (the jury) are not to understand, gentlemen, that the court charges you that there is no such independent corroborating testimony in this case.

Mr. Elder: I take exception to the qualification of your Honor.

The Court: Have you finished your exceptions and requests?

Mr. Elder: I think so.

The Court: Have you, Mr. Wolff?

GOVERNMENT'S REQUESTED INSTRUCTIONS TO JURY

Mr. Wolff: I ask your Honor to charge the jury the law does not require that there be corroboration of the testimony of Trinz. That if they believe what Trinz said to be the truth that is sufficient.

The Court: There you are squarely apart.

Mr. Elder: Yes, sir.

The Court: Very well; the motion of the government is granted; you have a clear exception to that part of it, Mr. Elder.

Mr. Elder: Thank you.

(The jury retired at 5.10 o'clock p. m.)

VERDICT

(The jury returned to the court room at 5.20 o'clock p. m., and rendered a verdict of guilty as against the defendant.)

[fol. 78] New York, April 5th, 1924.

(The defendant is arraigned for sentence.)

MOTION TO SET ASIDE VERDICT

Mr. Elder: I move to set aside the verdict and for a new trial on the ground that the verdict is against the law and contrary to the evidence and weight of the evidence, and on the ground of the exceptions taken during the trial; on the ground that the indictment does not state facts sufficient to constitute a cause of action; and on the ground that the government failed to make out a prima facie case; on the ground that there was no evidence of the materiality of the alleged false oaths, and on the ground that there was no evidence that the defendants knew that the alleged false oaths were or would be false when sworn to, and on the ground that there are no facts or circumstances in the evidence corroborated by the testimony of Trinz that his said oaths were false when made.

The Court: Motion denied.

Mr. Elder: Exception.

(Whereupon the hearing adjourned to May 5th, 1924, at 10.30 o'clock a. m.)

On the 5th day of May, 1924, it was again adjourned to May 19th, 1924.

On May 19, 1924, defendant was arraigned for sentence. Mr. Wolff moved that the judgment of the court be pronounced. Mr. Elder moved that judgment be arrested upon the ground that the indictment, and particularly the second count thereof, did not state [fol. 79] facts sufficient to constitute the crime which the jury, by its verdict, pronounced defendant to be guilty of, or any other crime

against the laws of the United States, and upon all the other grounds stated heretofore in motion to direct a verdict of acquittal and to set aside the verdict and for a new trial. Motion in arrest of judgment was denied. Mr. Elder excepted. Whereupon the court pronounced judgment that defendant be sentenced to a term of imprisonment in the United States Penitentiary at Atlanta, Georgia, for the term of one year and ten months.

Statement of Exhibits

EXHIBIT 1—FOR IDENTIFICATION ONLY

[fol. 80] EXHIBIT 2—ADJUDICATION IN BANKRUPTCY

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 34680

In the Matter of ANNIE HAMMER, Bankrupt

In New York City, in said district, on the 28th day of April, A. D. 1923, before the Honorable Julian W. Mack, Circuit Judge, holding the said court in bankruptcy, the petition of Herman Worton, et al., that Annie Hammer be adjudged a bankrupt, within the true intent and meaning of the Act of Congress relating to bankruptcy having been heard and duly considered and the bankrupt having consented to an adjudication, the said Annie Hammer hereby declared and adjudged a bankrupt accordingly.

And it is further ordered that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

And it is further ordered that the said matter be referred to Stephen H. Thayer, one of the referees in Bankruptcy of this Court to take all such further proceedings therein as are required by said Acts of Congress, and of such acts therein as the court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that [fol. 81] the bankrupt shall attend before the said referee on the 3rd day of May, 1923, at ten o'clock A. M. and to further submit to such orders as may be made by said referee or by the Court relating to said bankrupt.

Witness the Honorable Julian W. Mack, Circuit Judge, holding the said court and the seal thereof, at the City of New York, in said District, on the 28th day of April, A. D. 1923.

Alexander Gilchrist, Jr., Clerk.

Endosements: United States District Court, Southern District of New York. In the Matter of Annie Hammer, Bankrupt. Adjudication of Bankrupt and Order of Reference. Filed April 28, 1923. Lawrence I. Gerber, Attorney for Petitioning Creditors, 291-295 Broadway, New York City.

[fol. 82] Exhibit 3—Involuntary Petition in Bankruptcy

United States District Court, Southern District of New York

In the Matter of Annie Hammer, Bankrupt

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Herman Warton, Louis H. Trinz and Theresa Stochek, respectfully shows:

That Annie Hammer has for the greater part of six months next preceding the date of the filing of this petition, had a principal place of business at No. 253 Park Avenue, Yonkers, New York, in the Borough of ——, City of ——, County of —— and State of New York, —— District of New York, and is neither a wage earner, nor a person engaged principally in farming or tillage of the soil, or a municipal, railroad, insurance or banking corporation, and owes debts in the sum of one thousand dollars ($1,000) or over, and has been engaged in the business of a dressmaker.

That your petitioners are creditors of said alleged bankrupt, having provable claims against said alleged bankrupt amounting in excess to the value of the securities held by them to over five hundred [fol. 83] dollars ($500) and that the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:

The claim of your petitioner, Herman Warton, is for a note delivered to the said Alleged bankrupt within the past six months of the agreed price and reasonable value of upwards of four hundred dollars ($400).

The claim of your petitioner, Louis H. Trinz, is for a promissory note delivered to the said alleged bankrupt within the past six months of the agreed price and reasonable value of five hundred dollars ($500).

The claim of your petitioner, Theresa Stochek, is for a promissory note delivered to the said alleged bankrupt within the past — months of the agreed price and reasonable value of two hundred and fifty dollars ($250).

Upon information and belief the said alleged bankrupt insolvent and within the four months last preceding the filing of this petition, and while insolvent as aforesaid, committed an act of bankruptcy in that she did the following acts:

1. That while insolvent as aforesaid, the said alleged bankrupt transferred various moneys amounting in the aggregate to the sum of one thousand dollars ($1,000) to various of her creditors with intent thereby to prefer such creditors over other creditors of the same class, the names of such preferred creditors being unknown to your petitioners.

2. That the alleged bankrupt with intent to hinder, delay or defraud her creditors, and with intent and for the purpose of giving a [fol. 84] preference, contrary to the provisions of the Bankruptcy Act and upon pretended and alleged antecedent indebtedness claimed or alleged to be due from the said alleged bankrupt, to divers persons, firms and corporations, transferred and set over unto said divers persons, firms and corporations, whose names are unknown to your petitioners, valuable property, consisting of money, merchandise, accounts and dues receivable of the value of $1,000, applicable to the payment of the debts of said alleged bankrupt.

That there are not more than twelve creditors in number of said alleged bankrupt.

Wherefore, your petitioners pray that service of this petition with a subpœna may be made upon the said alleged bankrupt as provided by the Acts of Congress relating to Bankruptcy, and that she may be adjudged by the Court to be a bankrupt within the purview of said acts.

Dated New York, April 18, 1923.

Herman Warton, Louis H. Trinz, Theresa Stochek, Petitioners.

[fol. 85] State of New York,
County of New York,
City of New York, ss:

Herman Warton, being duly sworn, deposes and says that she is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he beileves it to be true.

Herman Warton.

Sworn to before me this 17th day of April, 1923. Leopold Klinger, Comm. of Deeds, N. Y. C.

State of New York,
County of New York,
City of New York, ss:

Louis H. Trinz, being duly sworn, deposes and says that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own

knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Louis H. Trinz.

Sworn to before me this 17th day of April, 1923. Leopold Klinger, Comm. of Deeds, N. Y. C.

[fol. 86] STATE OF NEW YORK,
County of New York,
City of New York, ss:

Theresa Stochek, being duly sworn, deposes and says that she is one of the petitioners herein; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Theresa Stochek.

Sworn to before me this 17th day of April, 1923. Lepold Klinger, Comm. of Deeds, N. Y. C.

Endorsements on involutionary petition: (77—34,680.) United States District Court, Southern District of New York. In the Matter of Annie Hammer, Bankrupt. Involutionary Petition in Bankruptcy. Lawrence I. Gerber, Counsellor at Law, Attorney for Petitioning Creditors, Office & P. O. Address, 291-295 Broadway, New York City. Filed April 18, 1923.

[fol. 87] EXHIBIT 4—SCHEDULES IN BANKRUPTCY

The following are the schedules:

Schedule A (1)—Statement of creditors to be paid in full or to whom priority is secured by law—None.

Schedule C (2)—Creditors holding securities—None.

Schedule A (3)—Creditors whose claims are unsecured—as follows:

Julius Sobel, 702 Eastern Parkway, Brooklyn, N. Y., for money loaned to petitioner on or about January 10, 1922	1,000
Jules H. Grosswein, 305 W. 98th St., New York City, for money loaned to petitioner on or about October 16, 1922	500
Herman Worton, 1653 Bathgate Ave., Bronx, N. Y., for money loaned to petitioner on or about December 23, 1923	400

Louis H. Trinz, c/o Freyer, 1106 Simpson Street, Bronx, N. Y. for money loaned to petitioner on or about February 14, 1923 500

Dr. David Greenberg, 1220 Grand Concourse, Bronx, N. Y. for money loaned to petitioner, on or about April 16, 1923 250

Lewis Cruger Hasell, W. Kintzing Post and Henry W. Hayden trustees under the Fifth clause of the Last Will and Testament of Mary Mason Jones, Deceased, for damages for breach of contract of lease upon which judgment was recovered in the Supreme Court, New York County, on the 27th day of October, 1922, said [fol. 88] judgment having been docketed in the office of the Clerk of the County of New York on the 27th day of October, 1922, and a transcript having been filed in the office of the Clerk of the County of Westchester on the 16th day of March, 1923, the residence of the foregoing persons being unknown to your petitioner. 8,827.60

Your petitioner is advised, however, that the names of the attorneys for the foregoing persons, and the only known address to the said creditors, is Townsend & Guiterman, Esqrs., 45 Cedar Street, New York City.

Lewis Cruger Hasell, W. Kintzing Post and Henry W. Hayden trustees under the Fifth clause of the last will and testament of Mary Mason Jones, Deceased. Damage is alleged to be due to said creditors by reason of a breach of a certain lease heretofore made by petitioner with Lewis Cruger Hasell, etc., dated about January, 1917, and which said claim is unliquidated.

The address of the foregoing creditors is unknown to your petitioner, except that the name of the attorneys of said creditors is Townsend & Guiterman, Esqrs., 45 Cedar Street, New York City.

Schedule A (4)—Notes or bills discounted which ought to be paid by the drawers, makers, acceptors or endorsers—None.

Schedule A (5)—Accommodation paper—None.

[fol. 89] Schedule B (1)—Real Estate of Bankrupt—None.

Schedule B (2)—Personal property of bankrupt—No property except personal wearing apparel of the value of $250 approximately, claimed to be exempt.

Schedule B (3)—Choses in action—None.

Schedule B (4)—Property in reversion, remainder or expectancy—Ordinary household furniture used by petitioner of the value of less than $250.

Schedule B (5)—Property claimed to be exempt under Acts of Congress—None.

Schedule B (6)—Books, papers, deeds, and writings, relating to Bankrupt's business and real estate—None.

[fol. 90] EXHIBIT 5—NOTICE OF APPEARANCE AND CONSENT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of ANNIE HAMMER, Bankrupt

SIRS: Please take notice that the aforementioned alleged bankrupt does hereby appear in this proceeding by her attorney, Jacob Stutsky, and demands that a copy of all papers be served upon him at his office, #220 Broadway, in the Borough of Manhattan, City of New York, and does hereby admit service of a copy of the subpoena and a copy of the Petition in Bankruptcy herein.

Dated April 19, 1923.

Yours, etc., Jacob Stutsky, Attorney for Bankrupt.

Office & P. O. Address: #220 Broadway, Bor. of Manhattan, City of New York.

SIRS: Please take further notice that the alleged bankrupt herein does hereby consent that an order of Adjudication in Bankruptcy be entered herein forthwith.

Dated New York, April 19th, 1923.

Jacob Stutsky, Attorney for Bankrupt.

[fol. 91] STATEMENT RE EXHIBITS 6, 7 and 8

Exhibit 6

So much of Exhibit 1 for identification, i. e., the stenographer's transcript of the testimony of Louis H. Trinz as was read in evidence.

Exhibit 7

So much of Exhibit 1 for identification, i. e., the stenographer's transcript of the testimony of Herman Warton, as was read in evidence.

Exhibit 8

So much of Exhibit 1 for identification, i. e., the stenographer's transcript of the testimony of Annie Hammer, as was read in evidence.

EXHIBIT 9—PROMISSORY NOTE

"$500.00/xx. N. Y., Oct. 14, 1922.

Three months after date I promise to pay to the order of Louis H. Trinz, Five Hundred & oo/xx Dollars Payable at 253 Park Avenue, Yonkers, N. Y., Value, received.

No. —. Due Jan. 14, 1923.

Annie Hammer."

[fol. 92] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

Thereafter, on the 15 day of September, 1924, within the time allowed, defendant presented the foregoing as his bill of exceptions, which having been examined, is allowed and signed and sealed and ordered on file as part of the record herein on the day and year above written.

Edwin L. Garvin, United States District Judge.

Consented to: William Hayward, U. S. Attorney. Robert H. Elder, Atty. for Defendant.

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

William Hayward, United States Attorney for the Southern District of New York.
Jac. M. Wolff, Assistant United States Attorney.
Robert H. Elder, Attorney for defendant.

OPINION

GARVIN, J.:

This is a motion by the defendant to set aside the verdict rendered by the jury, for a new trial, and in arrest of judgment. Defendant has been convicted of subornation of false swearing in a bankruptcy proceeding. The government charged that he had procured a witness to testify to an untruth at a hearing before a referee in bankruptcy. The defendant claims that this does not constitute perjury, and that there is no such crime as subornation of false swearing in a bankruptcy proceeding, citing Epstein vs. U. S., 196 Fed. 354; Epstein vs. U. S. 271 Fed. 282; Rosenthal vs. U. S., 248 Fed. 684; Kahn vs. U. S., 214 Fed. 54; and Ulmer vs. U. S., 219 Fed. 641.

There has been some discussion as to whether the indictment properly designates the crime therein charged. It is now agreed under authority of Williams vs. U. S., 168 U. S. 382, that an in-[fol. 94] dictment which charges a crime is sufficient, regardless of whether there has been a proper designation of the statute or statutes involved, either endorsed on the margin of the indictment, or referred to therein.

The first cited Epstein case, properly holds that false swearing in a bankruptcy proceeding is perjury, but the defendant claims that the case was decided because the court was outraged at the nature of the offense, the defendant being a member of the bar, and that inasmuch as the opinion shows that it was not carefully considered, it should be disregarded.

Perjury, as described in the U. S. Crim. Code, Sec. 125, is as follows:

"Whoever, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more *more* than five years."

Sec. 29B (2) of the Bankruptcy Act reads:

Making "a false oath or account in, or in relation to any proceed-
[fol. 95] ing in bankruptcy."

There could be no perjury under the criminal code, unless the false swearing concerned a material matter. Violation of Sec. 29B (2) of the bankruptcy law does not require that the false swearing should be with reference to a material matter. Furthermore, the section last quoted prohibits making a false account as well as making a false oath. Epstein vs. U. S., 271 Fed. 282, did not consider, or at least did not discuss the point here urged. It was not raised in that case.

It would seem from the Kahn case, supra, decided in this circuit, that the court intended to hold that the crime of false swearing in a bankruptcy proceeding is not so serious as that of perjury as defined by Sec. 125 of the Crim. Code. The opinion in that case states:

"It is said, however, that the falsity [of the statements assigned as perjury] was not shown by the clear and convincing proof necessary in perjury cases, which the defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special provision of the Bankruptcy Act making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and graudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed there was on the statute book, and had been for over a hundred years, a general perjury statute [fol. 96] (now Sec. 125 of the Criminal Code, Act March 4, 1909,) which provides that a person found guilty under its provisions 'shall be fined not more than two thousand dollars and imprisoned not more than five years.'

"If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for Sec. 29B (2) at all? The fact that the word perjury does not appear in the later act and that the term of imprisonment was reduced from five to two years and the $2,000 fine omitted

altogether, makes it clear that Congress in the Bankruptcy Act was dealing with a crime not in its judgment so aggravated as the crime of perjury."

On the other hand, the court observes:

"Of course, broadly stated, this is a perjury state," but the opinion nowhere mentions, much less overrules the case of Wechsler v. U. S. 158 Fed. 579, decided by this circuit. The opinion in the later case, as referring to the two statutes, reads:

"It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of either of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter [fol. 97] which he did not believe to be true. When a person states matter which he does not believe to be true 'wilfully and contrary to his oath,' he may certainly be said to make a false oath 'knowingly and fraudulently.' We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction shall be subjected to a different penalty.

"Counsel for the government, however, contends that this rule of construction does not apply, because Section 29 of the bankruptcy act creates a new statutory offense, not covered by Section 5392 of the United States Revised Statutes. The proposition advanced is that:

[fol. 98] "'A false oath made or taken before a commissioner of deeds, a justice of the peace, or a master in chancery would be capable of being used in bankruptcy proceeding, * * * but would alone be insufficient to constitute the crime of perjury.'

"The argument is that the making of such a false oath would not be 'within the commonlaw or statutory definition of perjury.' The making of a false affidavit is not perjury at common law when not made in a judicial proceeding or court of justice. The authorities relied upon by defendant in error are almost entirely concerned with perjury at common law. 2 Whart. Crim. Law, §§ 1244, 1267; Bishop on Crim. Law, §§ 1014, 1026, 1027; Hood v. State, 44 Ala. 81; Pegram v. Styron, 1 Bailey (S. C.) 595. A single authority

only deals with perjury under the statute of the United States. U. S. v. Bailey, 9 Pet. 238, 9 L. Ed. 113. In that case Bailey was indicted for perjury and false swearing under Section 3 of the act of March 1, 1823 (3 Stat. 771, c. 37), and Section 13 of the act of March 3, 1825 (4 Stat. 118, c. 65). The first of these sections provided:

" 'That if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury.'

[fol. 99] The other section provided:

" 'That if any person is any case, matter, hearing or other proceeding where an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished' et.

"Of these acts the court said they did not create or punish the crime of perjury, technically considered, but created a new and substantive offense of false swearing, and punished it in the same manner as perjury * * *. 'The oath, therefore, need not be administered in a judicial proceeding * * * so as to make the false swearing perjury.' When this Bailey case was under consideration, the federal statutory definition of perjury was substantially that of the common law. It was found in Sec. 18 of the act of April 3, 1790 (1 Stat. 116, c. 9) and read as follows:

" 'And be it (further) enacted, that if any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending [fol. 100] and being thereof convicted, shall be imprisoned not exceeding three years and fined not exceeding eight hundred dollars; and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States until such time as the judgment so given against the said offender shall be reversed.'

"It will be seen that Section 5392, Rev. St. U. S., contains the provisions both of the act of 1790 and of the act of 1825, and exactly covers false oaths such as the defendant made. The bankruptcy act, therefore, in this particular did not create a new offense, but merely prescribed a different penalty for one already defined.

"It is suggested that we are not to conclude that Congress could have intended to reduce the punishment of persons who made false oaths in bankruptcy proceedings below that prescribed for others who made such oaths elsewhere, since all false oaths are morally

wrong. The relative adjustment of punishments is, however, one wholly for the regulation of Congress, and this is not the first instance in which that body has introduced similar discriminations into the statutory penal law. The making of a false oath in applying for a pension would be within the provisions of Section 5392, but it is specially provided in Section 4746 [U. S. Comp. St. 1901, p. 3279] that for that offense the punishment shall be imprisonment not more than three years or a fine not to exceed $500 or both. So, too, the [fol. 101] making of a false affidavit on making an entry of imported merchandise would be perjury under Section 5392, but by Section 9 of the customs administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]), the maximum penalty for such offense is two years' imprisonment, or a fine of $5,000 or both. In like manner Section 5395, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3654], provides that where an oath or affidavit is made or taken under or by virtue of any law in relation to the naturalization of aliens, or in any proceeding under such laws, any person taking such oath or affidavit who knowingly swears falsely shall be punished by imprisonment of not more than five years or less than one year, and by a fine of not more than $1,000."

In Rosenthal v. U. S., supra, the court held one charged with false swearing in a bankruptcy proceeding cannot be prosecuted under Section 125 of the Crim. Code. To the same effect is Ulmer vs. U. S. supra. They do not seem to be inconsistent with the government's contention.

It does not seem to the court that the points as to insufficiency of the evidence to justify the conviction, raised by the defendant, require discussion. The jury has passed upon the facts.

Taking these decisions together, I am of the option that a crime was charged by the indictment. If this conclusion is correct, the motions must be denied.

Edwin L. Garvin.

[fol. 102] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Charles Hammer respectfully shows:

1. An indictment bearing number 36544 was found against me by the United States Grand Jury for the Southern District of New York, on the 1st day of February, 1924. Such indictment was brought on for trial in the United States District Court for the Southern District of New York, Honorable Edwin L. Garvin, presiding, at the March, 1924 term of such court. The jury brought in a verdict of conviction. Judgment on such verdict was pronounced against me on the 19th day of May, 1924.

2. During the course of the trial, and upon motion for a new trial after the verdict, I made motions and requested rulings which were denied, and to all of which I duly excepted, by reason whereof, the record of the cause contains errors requiring the judgment of the court to be reversed, as I contend and verily believe.

I pray, therefore, that a writ of error may be issued out of the United States Circuit Court of Appeals for the Second Circuit, directed to the United States District Court for the Southern District of [fol. 103] New York, to the end that said errors may be corrected according to law, and for a supersedeas, and for such other and further relief as may be just.

Charles Hammer, Petitioner. Robert H. Elder, Attorney for Petitioner, Seven Dey Street, Borough of Manhattan, City of New York.

Read on application for a writ of error this 19th day of May, 1924.
Edwin L. Garvin, District Judge.

[fol. 104] In United States District Court

[Title omitted]

Assignments of Error

Charles Hammer, plaintiff-in-error, makes and files this, his assignments of error:

1. The United States District Court for the Southern District of New York erred in permitting the witness Stephen H. Thayer to testify, over objection and exception, that he was a referee in bankruptcy for the Southern District of New York, and was such in the month of April, 1923.

2. The United States District Court for the Southern District of New York erred in permitting said witness to testify, over objection and exception, that when Annie Hammer was called as a witness in a bankruptcy proceeding on July 2, 1923, he administered to her an oath.

3. The United States District Court for the Southern District of New York, erred in permitting said witness to testify, over objection and exception, that when Louis H. Trinz appeared as a witness in such bankruptcy matter, he administered an oath to said Trinz.

[fol. 105] 4. The United States District Court for the Southern District of New York erred in permitting said witness to testify, over objection and exception, that on October 25, 1923, Herman Warton appeared as a witness in such proceeding, and that he, said Thayer, administered an oath to him.

5. The United States District Court for the Southern District of New York erred in receiving in evidence, over objection and ex-

ception, the following testimony of Herman Warton in such bankruptcy proceeding:

"Q. You did not have any other money?
A. Possibly another debt would be paid to me and that is how it accumulated and I could not save $200 out of my salary.
"Q. Do you know where you got the last $200?
A. I don't remember how it came to me."

6. The United States District Court for the Southern District of New York erred in receiving in evidence, over objection and exception, the following testimony of Herman Warton in such bankruptcy proceeding:

"Q. How did you happen to go—how did you happen to put this lady in bankruptcy?
A. I asked her for the money and she gave me a note and when the note came due I asked her again, and she said she didn't have it to give to me."

7. The United States District Court for the Southern District of [fol. 106] New York erred in receiving on the examination of the witness Trinz, over objection and exception, the following testimony:

"Q. As far as you recall, was that testimony read as your testimony this afternoon by the stenographer while you were in the courtroom, the testimony that you gave before Referee Thayer on October 25th, 1923?
A. I recollect it as such."

8. The United States District Court for the Southern District of New York erred in receiving on the examination of the witness Trinz, over objection and exception, the following testimony:

"Q. Before you began to give your testimony did the Referee administer to you an oath in substance as follows: 'Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?'
"A. I did."

9. The United States District Court for the Southern District of New York erred in receiving in evidence, over objection and exception, the paper writing marked "Government's Exhibit 9," same being in the form of a promissory note executed by Annie Hammer in favor of Louis H. Trinz.

10. The United States District Court for the Southern District of New York erred in receiving in evidence, and in declining to strike out, on the ground of irrelevancy, over objection and exception, this testimony of the witness Louis H. Trinz:

[fol. 107] "Mr. Hammer requested that I sign this petition in bankruptcy for him."

11. The United States District Court for the Southern District of New York erred in permitting the witness Louis H. Trinz to testify, over objection and exception, that there was a discussion in regard to the testimony to be given by him before the Referee at Stutsky's office on the 16th day of October, 1923, or thereabouts.

12. The United States District Court for the Southern District of New York erred in denying, over exception, defendant's motion made at the close of the Government's case to direct a verdict of not guilty, on the ground that the Government had failed to make out a prima facie case.

13. The United States District Court for the Southern District of New York erred in denying, over exception, defendant's motion made at the close of the whole case, to direct a verdict of not guilty upon the ground that the Government had failed to make out a prima facie case.

14. The United States District Court for the Southern District of New York erred in denying, over exception, defendant's motion to dismiss the indictment on the ground that same does not state any crime of perjury or subornation of perjury, and because the alleged false swearing was in a bankruptcy proceeding, and could not be prosecuted under the perjury statute.

15. The United States District Court for the Southern District of [fol. 108] New York erred in denying defendant's motion to direct a verdict on the ground that no case had been made out as to false swearing, and no case as to subornation of perjury.

16. The United States District Court for the Southern District of New York erred, upon the summation of the Assistant United States Attorney in commenting and ruling, and permitting said Assistant United States Attorney to comment as follows:

"Mr. Elder: I object to this, if the Court please.

The Court: On what ground?

Mr. Elder: Prejudice. It is not incumbent upon the defendant to call a witness.

He is not to be subjected to criticism for not having done it.

Mr. Wolff: I am not stating anything about the defendant's lack of taking the stand.

The Court: Now the Court will rule that the defendant is not required to take the stand, and no inference negative to him in the slightest degree may be taken by the jury as a result of such failure. The Government is required to prove its case beyond a reasonable doubt that he is the party who committed the crime. The jury is entitled to draw any unfavorable inference against either party to a prosecution which they think is warranted by reason of a failure of a party to present to the jury the testimony of the defendant, whose testimony would elucidate the matters in issue between the parties.

[fol. 109] Mr. Wolff: I haven't endeavored to criticise, I have not mentioned anything about the defendant not taking the stand.

The Court: Yes, the Court did not so understand.

Mr. Elder: May we have all of this part taken down? Because I object to it, your Honor. I object to it because there is no obligation on the part of the defendant to call any primary or any other witness in the whole world, and he is not to be criticised because he did not.

The Court: Do you agree with Mr. Elder upon that proposition?

Mr. Wolff: I certainly do not, sir.

The Court: The objection is overruled, and the absence of any primary witness on the stand may be commented on by the attorney for the United States Government.

Mr. Elder: I except.

Mr. Wolff (Addressing the jury): It is quite obvious, gentlemen, that Annie Hammer could enlighten you as to whether or not she received the money from Trinz. Who in the world would know better? She received the money from Trinz. Who would know better than she whether she signed that note and whether she gave it to him? That note dated back months before the petition in bankruptcy was signed and filed. Who signed and filed, to foist that note upon the referee in bankruptcy and the creditors in that bankruptcy proceeding. That note that Trinz did not see until after the petition in bankruptcy was signed and filed. Why did [fol. 110] they give him this note? This accurate mind of Hammer's sought to evolve something to explain the situation which had been created."

17. The United States District Court for the Southern District of New York erred, upon the summation of the Assistant United States Attorney in commenting and ruling, and permitting said Assistant United States Attorney to comment as follows:

"In the first place, the witness Stutsky was seated in the courtroom and heard the testimony given by Trinz; testimony very damaging to the defendant: Why didn't he take the witness stand?

Mr. Elder: I object to this, your Honor, and I ask that the jury be charged to disregard it. There is no evidence in this case that Stutsky is seated in the courtroom, and even if he were——

The Court: Objection sustained. Disregard it, gentlemen.

Mr. Wolff: The minutes show, the stenographer's minutes show that Mr. Stutsky is counsel for the defendant. I saw it on the stenographer's minutes.

Mr. Elder: Do you write shorthand?

Mr. Wolff: Yes, I do. Gentlemen, regardless of whether or not Stutsky is in this courtroom, it has been shown that there was no effort by the defendant to procure the attendance of Stutsky to contradict what Trinz said on the witness stand. That is obvious to you."

[fol. 111] 18. The United States District Court for the Southern District of New York erred in charging the jury, over exception, in the manner following:

"Mr. Elder: I request your Honor to charge the jury that this crime charged being subornation of perjury, that they cannot find the defendant guilty upon the testimony of Trinz uncorroborated or independent of facts and circumstances which tend to show that the testimony which he gave or says he gave before Referee Thayer was false.

Mr. Wolff: May I answer, if your Honor pleases?

The Court: Yes.

Mr. Wolff: If your Honor please, there is a rule I understand, your Honor will note, that in this court——

Mr. Elder: I thing if we are going to have an argument it ought to be——

The Court: An accomplice need not be corroborated.

Mr. Elder: It is not a question of an accomplice. I except to that. I do not want your Honor to be misunderstood in this. This is not a question of an accomplice. It is the old commn law rule, that in perjury and subornation of perjury, the testimony of one witness that the alleged subject matter of the perjury was false is not sufficient. The old rule was that there had to be two direct witnesses to the falsity of testimony. That has been modified by modern decisions, and now they say there has to be one direct witness to the falsity of the testimony and corroborative circumstances which [fol. 112] tend to support it.

Now I request your Honor to charge that unless there be such independent corroborative circumstances in this case, then the jury must find the defendant not guilty.

The Court: We are agreed, but you (the jury) are not to understand, gentlemen, that the court charges you that there is no such independent corroborating testimony in this case.

Mr. Elder: I take exception to the qualifications of your Honor.

The Court: Have you finished your exceptions and requests?

Mr. Elder: I think so.

The Court: Have you, Mr. Wolff?

Mr. Wolff: I ask your Honor to charge the jury the law does not require that there be corroboration of the testimony of Trinz. That if they believe what Trinz said to be the truth that is sufficient.

The Court: There you are squarely apart.

Mr. Elder: Yes, sir.

The Court. Very well; the motion of the government is granted; you have a clear exception to that part of it, Mr. Elder.

Mr. Elder: Thank you."

19. The United States District Court for the Southern District of New York erred in omitting to charge the jury that the testimony of the witness Trinz should be scrutinized carefully, and that care and caution should be excercised in viewing such testimony.

[fol. 113] 20. The United States District Court for the Southern District of New York erred in omitting to charge the jury that they should not convict upon the uncorroborated testimony of the witness Trinz, unless they found his story, as told, to be straightforward, and to have a ring of truth, and to indicate unequivocably the guilt of defendant.

21. The United States District Court for the Southern District of New York erred in denying defendant's motion to set aside the verdict and for a new trial.

22. The United States District Court for the Southern District of New York erred in denying, over exception, defendant's motion that judgment be arrested on the ground that the indictment does not state facts constituting a crime.

Dated May 19, 1924.

Robert H. Elder, Attorney for Plaintiff-in-Error, Seven Dey Street, Borough of Manhattan, City of New York.

Read on application for writ of error this 19th day of May, 1924.

Edwin L. Garvin, District Judge.

[fol. 114] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT AND FIXING BAIL

Judgment of conviction having been rendered herein against the defendant above named on this 19th day of May, 1924, and defendant having applied for a writ of error to the United States Circuit Court of Appeals for the Second Circuit, and to be admitted to bail pending the determination thereof, and for a stay,

Now, upon motion of Mr. Robert H. Elder, attorney for defendant, it is

Ordered that a writ of error be issued as prayed for; and it is further

Ordered that defendant be admitted to bail pending such review in the sum of $5,000.00, and the writ of error together with such [fol. 115] bail shall act as a supersedeas, and that execution of such judgment be stayed; and it is further

Ordered that at any time within ninety days defendant may amend the assignments of error this day filed on his application for a writ of error, by assigning other or additional errors, or by assigning the same errors in other or different language.

Edwin L. Garvin, District Judge.

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between the United States of America, plaintiffs, and Charles Hammer, defendant, a manifest error hath happened, to the great damage of the said Charles Hammer, as is said and appears by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States [fol. 116] Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 18th day of June, 1924, that the record and proceedings aforesaid being inspected, the said Judges for the United States Circuit Court of Appeals of the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 19th day of May, in the year of our Lord, one thousand, nine hundred and twenty-four, and of the Independence of the United States, the one hundredth and forty-eighth.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit. (Seal.)

The foregoing writ is hereby allowed the 19th day of May, 1924.

Edwin L. Garvin, United States District Judge.

[fol. 117] CITATION—In usual form; omitted in printing

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING RETURN DAY OF CITATIONS AND WRIT OF ERROR

Upon reading and filing the annexed affidavit of Otho S. Bowling, it is

Ordered that the time within which the writ of error and citation allowed herein the 19th day of May, 1924, may be returned, be extended to the 18th day of August, 1924.

Dated June 18, 1924.

Edwin L. Garvin, United States District Judge.

Consented to: William Hayward, United States Attorney for the Southern District of New York.

[fol. 119] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF OTHO S. BOWLING

STATE OF NEW YORK,
County of New York, ss:

Otho S. Bowling, being duly sworn, says:

I am of counsel for defendant. Judgment of conviction against him was pronounced herein on the 19th day of May, 1924, Honorable Edwin L. Garvin, presiding. Thereupon Judge Garvin allowed a writ of error to the United States Circuit Court of Appeals, Second Circuit, and signed a citation, both returnable on the 18th day of June, 1924. The bill of exceptions is being prepared, and will be ready long before the time when, under the rule, such bill of exceptions may be filed; namely, August 18, 1924. It will be impossible to return the citation and writ of error on June 18, 1924.

I pray, therefore, that the time within which such citation and writ of error may be returned, be extended to run concurrently with the time within which the bill of exceptions may be filed.

No previous application has been made.

Otho S. Bowling.

Sworn to before me this 17th day of June, 1924. G. M. McDonnell, Notary Public, New York County.

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE

Upon reading and filing the notice of motion, dated August 4th, 1924; the affidavit of Otho S. Bowling, vertified the 4th day of August, 1924; and the waiver of notice of the United States District Attorney endorsed thereon;

Now, upon motion of Mr. Robert H. Elder, attorney for defendant, it is

Ordered that the term of court at which judgment was pronounced against the above named defendant herein, be and hereby is extended to the 16th day of September, 1924, for all purposes of this action, and that the return day of the writ of error to review such judgment of conviction, and the citation issued thereupon, be and hereby is likewise extended to the 16th day of September, 1924.

Geo. W. McClintic, District Judge.

[fol. 120a] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon reading and filing the annexed affidavit of Otho S. Bowling, vertified the 15th day of September, 1924;

Now, upon motion of Mr. Robert H. Elder, attorney for defendant, it is

Ordered that the term of court at which judgment was pronounced against the above named defendant, be and hereby is extended to the 7th day of October, 1924, for all purposes of this action; and that the return day of the writ of error on review of such judgment of conviction, and the citation issued thereupon, be and hereby are likewise extended to the 7th day of October, 1924.

William I. Grubb, District Judge.

Consented to. Wm. Hayward, United States Attorney for the Southern District of New York.

[fol. 121] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of record in the District Court in this action, as agreed upon by the parties.

Dated New York, September 15, 1924.

Robert H. Elder, Attorney for Plaintiff-in-Error. William Hayward, Attorney for Defendant-in-Error.

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled action as agreed on by the parties.

In witness whereof,, I have caused the seal of said Court to be hereto affixed at the City of New York, in the United States District Court of New York, this 2 day of October, 1924.

Alexander Gilchrist, Jr., Clerk.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES HAMMER, Plaintiff-in-Error,

against

UNITED STATES OF AMERICA, Defendant-in-Error

Before Rogers, Hough, and Manton, Circuit Judges

Robert H. Elder, for Plaintiff-in-Error.

Otho S. Bowling, of Counsel.

William Hayward, United States Attorney, for Defendant-in-Error.

Jac M. Wolff, Assistant United States Attorney, of Counsel.

OPINION

This case comes here on writ of error to the United States District Court for the Southern District of New York.

The facts appear in the opinion.

ROGERS, Circuit Judge: The plaintiff-in-error, hereinafter called the defendant, was indicted, tried, and convicted upon an indictment which charged him with the commission of a crime. The indictment contained three counts. At the conclusion of the trial the defendant's counsel moved the court to direct the jury to find a verdict of not guilty on the first count upon the ground that there was no evidence to sustain it. The motion was granted, with the admis-[fol. 123] sion of the counsel for the United States that there was no evidence to show guilt under that count. Thereupon a similar motion was made as to the third count, and with a like concurrence by

the counsel for the United States that motion was likewise granted. The first count charged that the defendant had suborned his wife, Annie Hammer, falsely to testify before a referee in bankruptcy that she had borrowed money from one Herman Warton and one Louis H. Trinz. The third count was similar but named the person suborned as Herman Warton.

We therefore are now concerned with the second count only which was the count upon which the defendant was convicted. That count charged that the defendant had suborned Louis H. Trinz falsely to testify in the proceeding before the referee in bankruptcy that he had prior to April 18, 1923, loaned to Annie Hammer the sum of $500, and that she had prior to that date signed and delivered to him her promissory note for that amount, which note was dated Oct 14, 1922, whereas in truth and in fact the said Trinz and the defendant well knew that the facts testified to by Trinz were untrue and that they at no time believed them to be true.

At the end of the charge to the jury the defendant's counsel preferred some 8 requests to charge and the Court directed the jury as requested.

The last request he made was the following:

"I request your Honor to charge the jury that this crime charged being subornation of perjury, that they cannot find the defendant guilty upon the testimony of Trinz uncorroborated or independent of facts and circumstances which tend to show that the testimony which he gave or says he gave before Referee Thayer was false."

[fol. 124] Thereupon, after some colloquy, the following occurred:

"The Court: An accomplice need not be corroborated.

Mr. Elder: It is not a question of an accomplice. I except to that. I do not want your Honor to be misunderstood in this. This is not a question of an accomplice. It is the old common law rule, that in perjury and subornation of perjury, the testimony of one witness that the alleged subject matter of the perjury was false is not sufficient. The old rule was that there had to be two direct witnesses to the falsity of testimony. That has been modified by modern decisions, and now they say there has to be one direct witness to the falsity of the testimony and corroborative circumstances which tend to support it.

Now I request your Honor to charge that unless there be such independent corroborative circumstances in this case then the jury must find the defendant not guilty.

The Court: We are agreed, but you (the jury) are not to understand, gentlemen, that the court charges you that there is no such independent corroborating testimony in this case.

Mr. Elder: I take exception to the qualification of your Honor."

Then the Court asked the counsel for the United States whether he had any requests and the following occurred:

"Mr. Wolff: I ask your Honor to charge the jury the law does not require that there be corroboration of the testimony of Trinz. That if they believe what Trinz said to be the truth that is sufficient.

The Court: There you are squarely apart.
Mr. Elder: Yes, sir.
The Court: Very well; the motion of the government is granted; you have a clear exception to that part of it, Mr. Elder.
Mr. Elder: Thank you."

It thus appears that the court at the request of defendant's counsel charged that the jury could not find defendant guilty of subornation of perjury upon the testimony of Trinz uncorroborated, and then upon the request of the counsel for the United States as flatly instructed them that the law does not require that there be corroboration of the testimony of Trinz. This of course contradicted what he [fol. 125] had just charged on the subject and amounted to a withdrawal of his previous instruction. The question is whether the court fell into error in charging that the jury could convict the defendant of subornation of perjury on the uncorroborated testimony of Trinz.

Lord Coke defined perjury by saying that it "is a crime committed when a lawful oath is administered, by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subornation of others." 3 Inst. 164. Blackstone followed it in substance. 4 Bl. Com. 137. Perjury does not include all false declarations made under oath. See Bishop's Criminal Law (9th Ed.) vol. 2, sec. 1014 and sec. 1197 a 1.

But for the courts of the United States the crime of perjury is defined in the Criminal Code, Section 125. It declares as follows:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than two thousand dollars and imprisoned not more than five years."

And the crime of subornation of perjury is defined in Section 126 of the same Code as follows:

"Whoever shall procure another to commit any perjury is guilty [fol. 126] of subornation of perjury, and punishable as in the preceding section prescribed."

The latter section has been held to embrace subornation of every sort of perjury. Epstein v. United States 196 Fed. 354. In that case decided by the Circuit Court of Appeals in the Seventh Circuit, it was held that false swearing in bankruptcy proceedings constituted "perjury" within Sections 5392 and 5393 above set forth. And the

court further held that Section 29[1] of the Bankruptcy Act of 1898 merely changed the punishment for perjury committed in bankruptcy proceedings, and that therefore suborning a witness at a hearing in bankruptcy to commit perjury constituted an offence within sections 5392 and 5393. We fully concur in the conclusion reached in that case and for the reasons *there stated*. False swearing in bankruptcy proceedings is perjury within the meaning of Section 5392. And Section 5393 embraces subornation of every sort of perjury.

In this connection we call attention to what was held by the Circuit Court of Appeals in the Sixth Circuit in Daniels v. United States 196 Fed. 459. It was there held that the provision in the Bankruptcy Act of July 1, 1898, Sec. 7a (9) c. 541 (30 Stat. 548) providing that no testimony given by a bankrupt on his examination "shall be offered in evidence against him in any criminal proceeding" has reference only to crimes committed previous to the giving of such testimony and not to any criminal proceeding based on a crime inherent in the bankrupt's examination, and in a prosecution [fol. 127] for perjury committed during the examination the alleged false testimony may be given in evidence.

This Court in the earlier case of Wechsler v. United States 158 Fed. 579, passing on the provision in Section 7a (9) of the Bankruptcy Act of 1898, that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, held that it did not give immunity from prosecution for giving false testimony upon any such examination. It then went on to hold that the provision made in Section 29b (2) providing for the punishment of any one who wilfully and fraudulently made a false oath in, or in relation to, any proceeding in bankruptcy does not create a new offense, but merely prescribes a different penalty for the crime of perjury when committed in a bankruptcy proceeding. That case received very careful consideration in an opinion written by Judge Lacombe and concurred in by Judges Coxe and Ward.

Some unguarded expressions used in the opinion of this Court in Kahn v. United States 214 Fed. 54, it is said over-ruled the Wechsler case. The same Judges decided both cases. Judge Coxe wrote for the Court in the Kahn case and the other two Judges concurred. The opinion contains no reference to the Wechsler case, and it is not at all probable that the Court would deliberately over-rule that carefully considered decision and make no allusion whatever to it. We are satisfied that there was not the slightest intention on the part of any of the Judges to over-rule the earlier case. It is still the law [fol. 128] of this Circuit and we adhere to it and believe it to have been properly decided.

The civil law of evidence in Continental Europe differed from the common law in material respects. It was a general rule of the civil law that one witness alone was insufficient upon any material point.

[1] It provides that a person shall be punished by imprisonment not to exceed two years who makes a false oath or account in, or in relation to any proceeding in bankruptcy, and the indictment or information must be within one year after the commission of the offense.

But the common law courts rejected this general rule of the civil law and denied that the probative value of testimony was to be measured by some uniform numerical standard. They adopted instead the principle that the efficacy of testimony depended upon the character and trustworthiness of the witness. And the general rule of the common law is well established that if the jury believes the statement of a single witness they may found their verdict upon it even though the witness stands alone and his testimony is contradicted by others not believed by them. Wigmore on Evidence (1st Ed.) vol. 3, p. 2711, sec. 2034. It is a maxim of the law testes ponderantur non numerantur.

But there are some exceptions to the rule that the testimony of a single witness may suffice to establish any controverted fact. The Constitution of the United States, in Art. III, sec. 3, provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

And at common law one cannot be convicted of perjury by the testimony of a single witness unless there are corroborating circumstances. Wigmore in his work on Evidence (1st ed.) vol. 3, p. 2721, sec. 2040, in laying down this rule states that it is "the single com-[fol. 129] mon law exception to the doctrine that one witness alone may suffice in every case." He adds that "it is fairly clear that there was no such rule of common law until towards the first half of the 1700s." While the rule at one time was that a conviction for perjury could not be had except upon the direct testimony of two witnesses, this has been for a long time relaxed, and it is now well established that a charge of perjury may be sustained either by the testimony of two witnesses or by that of one witness and corroborating circumstances. United States v. Coons 25 Fed. Cas. No. 14,860; United States v. Jones, Fed. Cas. No. 15,491; United States v. Baer, 6 Fed. 42; United States v. Mallard, 40 Fed. 151; United States v. Hall, 44 Fed. 864; Holy v. United States 278 Fed. 521; O'Leary v. United States 158 Fed. 796; Hashagen v. United States, 169 Fed. 396; Lever v. United States 183 Fed. 102; Allen v. United States 194 Fed. 664; Greene v. People 182 Ill. 278; Peterson v. State 74 Ala. 34; State v. Jean 42 La. Ann. 946; Brown v. State, 57 Miss. 424; People v. Doody 172 N. Y. 165.

The rule that in cases of perjury the crime is so heinous as compared with other crimes that in order to convict it is necessary that there should be at least one witness and that he must be corroborated by circumstantial evidence, is repudiated by some of the authorities as out of harmony with our system of jurisprudence. In State v. Storey, 148 Minn. 398, the court held that perjury may be proved by circumstantial evidence alone. And see In re Metcalf, 8 Okl. Crim. 605; People v. Doody 172 N. Y. 165.

[fol. 130] That the rule applied to perjury is not to be applied to subornation of perjury seems to us to be clear upon reason and authority. It is true that in People v. Evans 40 N. Y. 1 it was held that subornation of perjury may not be proven by the uncorroborated testimony of the person suborned.

In Wigmore on Evidence (2nd ed.) vol. 4, sec. 2042, p. 323, the rule is stated that in case of one charged with perjury a single witness suffices if corroborated. He then goes on to say that "The rule should not apply necessarily to a charge of subornation of perjury, because the act of subornation does not involve the theory of oath against oath, and the perjury may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution."

In Bishop's Criminal Law (9th ed.) vol. 2, sec. 1198, it is laid down that "Since a suborner of pejury is not charged with giving false testimony; since he does not commit his crime while testifying, his conviction requires no greater proof than does that of a thief." And in 30 Cyc. 1454 the rule is stated as follows:

"That rule that under an indictment for perjury defendant cannot be convicted on the uncorroborated testimony of a single witness is not applicable to a case of subornation of perjury."

In United States v. Thompson 31 Fed. 331 (1887) Judge Deady held that the person solicited to commit perjury is not an accomplice in the crime of subornation committed by the person who suborned [fol. 131] him, and that the fact that he committed the perjury did not prevent the jury from convicting the suborner of the solicitation on his testimony. Judge Deady held that the defendant could be found guilty of subornation of perjury on the uncorroborated testimony of the person solicited to commit the perjury—the question of his credibility being for the jury.

In Boren v. United States, 144 Fed. 801 the Circuit Court of Appeals for the Ninth Circuit held that the rule that under an indictment for perjury the defendant cannot be convicted on the uncorroborated testimony of a single witness is not applicable to a case of subornation of perjury. The court in that case said:

"It is urged that there is not sufficient evidence to sustain the verdict, for the reason that the proof of each count consists of the testimony of a single witness. It is true that under indictments for perjury the generally accepted rule is that the accused cannot be convicted on the uncorroborated testimony of a single witness. The reason assigned is that the same effect is to be given to the testimony of the party accused as to that of the accusing witness, and the proof would be merely the oath of one person against that of another. The reason of the rule in the form in which it is expressed does not apply to a case of subornation of perjury such as the present case for the reason that here the testimony does not consist of the oath of one person against that of another. The testimony of each witness for the government involves, it is true, the impeachment of his own former sworn statement, but it is direct evidence against the accused as to his instigation of the perjury. We find that in People v. Evans, 40 N. Y. 1, it was held that subornation of perjury may not be proven by the uncorroborated testimony of the person suborned. The contrary was held by Judge Deady in

United States v. Thompson (C. C.) 31 Fed. 331. In State v. Renswick, 85 Minn. 19, 88 N. W. 22, it was held that, where it is sought to establish by his own testimony the perjury of the person suborned, his testimony must be corroborated, but that fact that the [fol. 132] accused suborned or induced him to commit the crime may be established by the uncorroborated testimony of the witness if it satisfies the jury beyond a reasonable doubt."

In 1842 the Supreme Court of Massachusetts in Commonwealth v. Douglass 46 Mass (5 Met.) 241, had the question before it. It held that subornation of perjury may be proved by the testimony of one witness. Referring to the rule that in cases of perjury guilt must be proved either by two witnesses or by one witness and by other independent evidence, corroborative of his testimony, the Court said:

"It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named; and in this respect no objection is made to the instructions of the court to the jury. And as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of the said crime, we think it very clear that the same rule of evidence does not apply. The reason of the rule in cases of perjury is, that the same effect is to be given to the testimony of the party accused, as to that of the accusing witness, so that if there be no other proof, the scale of evidence is poised; there being witness against witness, oath against oath. No such reason exists as to the proof of that part of the indictment which charges the defendant with the procuring of the commission of the perjury; and this part of the charge, as we think, may undoubtedly be proved by the testimony of one witness. This exception therefore is not founded on any good reason, nor do we find it sustained by any authority."

The Supreme Court of Missouri in State v. Richardson, 248 Mo. 563,570 considered this question at length reviewing the authorities and in an opinion concurred in by all the judges came to the conclusion that the common law rule that in perjury cases the defendant [fol. 133] cannot be convicted on the uncorroborated testimony of a single witness, but that that rule is without application to one charged with subornation of perjury. In the course of its opinion the Court, after stating the reasons for the rule applied to one charged with perjury, said:

"By what course of logic can these reasons be made to apply to the case of a suborner? Why should the rules as to him be different from that applied in cases of larceny, rape, or other criminal offenses? The presumption of his innocence certainly is of no greater weight than in the case of one accused of larceny or rape. There is no public policy reason why his conviction should be made more difficult than in the majority of other felonies. He is not convicted of an offence

occurring while he is under oath and testifying. The offence that he commits is virtually consummated before the witness gives his testimony. He is not charged with the giving of false testimony. He does not commit his crime while performing any necessary function in the progress of a trial. Why then should his conviction require greater proof than in convicting for theft. We do not think it does. All of the authorities hold that a single witness, uncorroborated, can make sufficient proof of the suborning."

We have no doubt that one who in a bankruptcy proceeding swears wilfully and falsely to matter which he does not believe to be true commits perjury. And the record discloses that Trinz, when examined in this case, admitted that he testified falsely before the referee in bankruptcy. The following is an excerpt from his testimony in this case—his attention having first been called to the testimony he gave in the bankruptcy proceeding:

"Q. As far as you recall, was that testimony read as your testimony this afternoon by the stenographer while you were in the courtroom, the testimony that you gave before Referee Thayer on October 25th, 1923?

A. I recollect it as such.

[fol. 134] Q. You recollect the question, 'You did loan her some money?' And your answer, 'Yes, sir.' Do you recall that question?

A. I do.

Q. And you recall that answer?

A. I do.

Q. Did you ever loan Annie Hammer any money?

A. No, sir.

Q. I speak not alone at this time, but at any time in your life, did you ever loan her money?

A. No, sir.

Q. Did Annie Hammer ever give you a promissory note in consideration of a loan you made to her?

A. No, sir."

Then he proceeded to testify to the fact that he was induced to testify as he did by Charles Hammer, the defendant herein. If the jury believed his story beyond a reasonable doubt they were justified in finding Hammer guilty as charged in the indictment.

Judgment Affirmed.

[fol. 135] In United States Circuit Court of Appeals

[Title omitted]

Error to the District Court of the United States for the Southern District of New York

Judgment—March 9, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

H. W. R. M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 136] [File endorsement omitted.]

[fol. 137] In United States Circuit Court of Appeals

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 136 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Charles Hammer, Plaintiff in Error, against United States, Defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of March in the year of our Lord One Thousand Nine Hundred and twenty-five and of the Independence of the said United States the One Hundred and forty-ninth.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals.)

[fol. 138] Supreme Court of the United States

Order Allowing Certiorari—Filed April 13, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]

Supreme Court of the United States

October Term, [redacted] 1925

CHARLES HAMMER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI WITH MOTION OF SUPERSEDEAS

ROBERT H. ELDER,
Counsel for Petitioner.

The Law Print, 37 Maiden Lane, N. Y. [redacted] 1925

SUBJECTS.

DISCUSSION.

AUTHORITIES.

Petition for Writ of Certiorari.

Supreme Court of the United States

OCTOBER TERM, 1924.

CHARLES HAMMER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This, the petition of Charles Hammer, respectfully shows:

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

History of the Case.

2. The case arose in the United States District Court for the Southern District of New York where petitioner was indicted of subornation of perjury.

The indictment, in three counts, charged him with suborning three persons to testify falsely before a referee in bankruptcy. The case was tried before District Judge Edwin L. Garvin and a jury. Two counts were dismissed because no evidence tended to sustain them. The remaining count was submitted to the jury and it rendered a verdict of guilty. The judgment of the court was that petitioner be imprisoned in the penitentiary at Atlanta for one year and ten months. On error to the Circuit Court of Appeals for the Second Circuit the judgment of conviction was affirmed. The judgment of the District Court was rendered May 19, 1924. The opinion of the Circuit Court of Appeals was handed down March 2, 1925, and its order of affirmance entered March 9, 1925.

The Questions of General Interest Involved.

3. The accusation of which petitioner was convicted was that he procured Trinz to testify falsely in a bankruptcy proceeding. The indictment was for subornation of perjury, and was so treated on the trial and in the Circuit Court of Appeals. No evidence was offered to show the testimony of Trinz in bankruptcy to be false except the statement of Trinz himself, asserting that what he said in bankruptcy was false, but what he said on the trial of petitioner was true. These questions therefore arose:

A. *Does the taking of a false oath in bankruptcy constitute perjury, in view of the fact that the offense is specially defined by the Bankruptcy Act and a special punishment and a special term of limitation there provided? The distinction between*

perjury and false oaths not amounting to perjury is a very old one and has been steadily recognized in the statutes of the United States. The decision of the Circuit Court of Appeals for the Second Circuit, deciding that the taking of such an oath is perjury, is not only contrary to its own prior decision (*Kahn* v. *U. S.*, 214 Fed. 54), *but is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit* (*Ulmer* v. *U. S.*, 219 Fed. 641, 647-648) *and the Circuit Court of Appeals for the Eighth Circuit* (*Rosenthal* v. *U. S.*, 248 Fed. 684, 685).

If the court below erred in deciding this point the error is vital, since there can be no subornation of perjury unless perjury itself be committed.

B. *There was no evidence offered to show the falsity of the oath which petitioner was accused of having suborned, except the testimony of the witness himself. The rule that in prosecution for perjury the falsity of the oath must be proved by two witnesses, or by one witness and corroborating circumstances, and that the uncorroborated testimony of one witness is never enough, is too well fixed in our law to be questioned. The Circuit Court of Appeals did not question it, but while conceding that it applied in prosecution of the* PERJURER, *they denied that it applied in prosecution of the* SUBORNER. *This distinction is contrary to the common law of England and contrary to the decisions of all of the states of this union, excepting Missouri alone. We believe it to be contrary to good logic. The question is of public interest because it is fundamental to the law of subornation of perjury and is certain to arise again.*

If the Circuit Court of Appeals erred in deciding this point the error is vital, because the point was raised both by motion to acquit and by proper request for an instruction. Indeed, it is obvious and not open to dispute that the testimony of the witness Trinz, who said he swore falsely before the referee in bankruptcy, was uncorroborated.

4. Because the Circuit Court of Appeals for the Second Circuit erred in deciding the foregoing questions, and because they are important, as will be more fully expounded in the brief accompanying this petition, petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit to the end that the errors aforesaid may be corrected.

Dated, March 13, 1925.

ROBERT H. ELDER,
Counsel for Petitioner.

I certify that, in my opinion, the foregoing petition is well founded and that it is not interposed for the purpose of delay.

ROBERT H. ELDER,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924.

CHARLES HAMMER,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Petitioner was indicted of the crime of subornation of perjury in the United States Distrct Court for the Southern District of New York. The bill alleged three offenses, viz., the suborning of three persons to testify falsely in proceedings before a referee in bankruptcy (R., pp. 1-18). On the trial Judge Garvin directed a verdict as to the first and third counts because of lack of evidence to sustain them (R., p. 60). The sec-

ond count he submitted to the jury and it returned a verdict of guilty. Petitioner was thereupon sentenced to imprisonment for a term of one year and ten months (R., p. 79).

The case in the District Court is reported as *United States* v. *Hammer*, 299 Fed. 1011. In the Circuit Court of Appeals it is not yet reported.

POINTS.

I.

The decision of the Circuit Court of Appeals holding that the taking of a false oath in a bankruptcy proceeding is perjury is erroneous, and is in conflict with decisions of the Circuit Courts of Appeal for the Sixth and Eighth Circuits, and is opposed to an earlier decision of its own.

(A) *The question.*

Perjury and subornation of perjury are defined *Crim. Code*, sec. 125:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than

two thousand dollars and imprisoned not more than five years."

Crim. Code, sec. 126:

"Whoever shall procure another to commit any perjury is guilty of subornation of perjury and punishable as in the preceding section prescribed."

The Bankruptcy Act (§29b [2]) provides:

"A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently,

* * * * * *

"Made a false oath or account in, or in relation to, any proceeding in bankruptcy."

Is a person who commits "*the* offense" of making a false oath "in or in relation to any proceeding in bankruptcy" guilty of the offense defined in Crim. Code, §125 or is he guilty of the *different* offense defined in Bankruptcy Law, §29b?

The distinction between perjury and false oaths not amounting to perjury is classical.

2 *Bish. New Crim. Law*, §1014.
30 *Cyc.* 1400-1401.
U. S. v. *Elliott*, 3 Mason 156.

The Congress of the United States has not infrequently defined instances where false oaths are punishable, but *not* as *perjury*. For example:

Crim. Code, §80 (naturalization).
36 *Stat.* 1015, ch. 200 (national parks).
40 *Stat.* 441, §200 (2) (military service affidavit).

That Congress, in enacting §29b of the Bankruptcy Act, intended to create a *new* offense and not a new species of the existing crime of perjury is indicated by this:

(a) The act *defines* the offense and *prescribes the punishment* for it. It is a rule of interpretation that when a later *specific* statute defines an offense and prescribes the punishment for it, such offense is deemed to be taken without the scope of an earlier *general* statute.

U. S. v. *Tynen,* 78 U. S. (11 Wall.) 88.

(b) The *language* chosen indicates a purpose to define a new offense. It is:

> "A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently,
>
> (1) concealed while a bankrupt, * * *
>
> (2) made a false oath or account * * *
>
> (3) presented under oath any false claim * * *
>
> (4) received any material amount or property from the bankrupt, * * *
>
> (5) extorted or attempted to extort any money or property * * *"

That is, the language indicates that the draughtsman considered these five varieties of misconduct in bankruptcy as different forms of *the same offense.* It is inconsistent with an intent to make part of "the offense" so defined identical with the crime defined in Crim. Code, §125, viz., perjury.

In section 29d the period of limitation is defined and there the language chosen is:

> "A person shall not be prosecuted for any offense *arising under this act* unless * * *"

Which shows that the draughtsman considered false swearing in bankruptcy as an offense *arising* under the Bankruptcy Act, and not one arising under the act defining perjury.

(c) Whereas *materiality* is essential to perjury, it is not an element of a false oath in bankruptcy.

(d) Whereas the punishment for perjury is imprisonment for not more than *five* years *plus* a fine of not more than $2,000 (Crim. Code, §125), the punishment for false swearing in bankruptcy is imprisonment for not more than *two* years *without* a fine; and whereas the term of limitation for prosecution for perjury is *three* years (R. S. 1044), the term of limitation for prosecution for false swearing in bankruptcy is *one* year (Bankruptcy Act, §29d).

(B) *The conflicting decisions of the Circuit Courts of Appeals.*

In harmony with the decision below are:

Wechsler v. *U. S.*, 158 Fed. 579, the first decision of the Circuit Court of Appeals for the Second Circuit on the point which was followed in the decision below as stating the law of the Second Circuit (R., p. 128). There the court reached the conclusion:

> "The two sections may be construed together providing a stated penalty for the crime of false swearing generally, with the

> proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty" (p. 581).

Epstein v. *U. S.*, 196 Fed. 354, a decision of the Circuit Court of Appeals for the Seventh Circuit. There it was said:

> "In our judgment false swearing in bankruptcy proceedings is perjury, nothing more, nothing less" (p. 356).

In conflict with the decision below are:

Kahn v. *U. S.*, 214 Fed. 54, an earlier decision of the Circuit Court of Appeals for the Second Circuit. In deciding this cause the court explained the language quoted below as being "some unguarded expressions" (R., p. 128):

> "It is said, however, that their falsity [of the statements assigned as perjury] was not shown by the clear and convincing proof necessary in perjury cases, which defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special section of the Bankruptcy Act, making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and fraudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed, there was on our statute books, and had been for over a hundred years, a general perjury statute (now sec. 125 of the Criminal Code. * * * which provides

that a person found guilty under its provisions 'shall be fined not more than $2,000 and imprisoned for not more than five years.'

If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for sec. 29b (2) at all? That fact that the word *perjury* [sic] does not appear in the later act [Bankruptcy Act] and that the term of imprisonment was reduced from five years to two years, and that the $2,000 fine omitted altogether, makes it clear that Congress in the Bankruptcy Act, was dealing with a crime not, in its judgment, so aggravated as the crime of perjury" (p. 56).

Ulmer v. *U. S.*, 219 Fed. 641, a decision of the Circuit Court of Appeals for the Sixth Circuit. There it was said:

"If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial, * * *; but the prosecution cannot be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *U. S.*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, §29b (2), so as to charge that Ulmer 'made a false oath in and in relation to a proceeding in bankruptcy.' We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for

> support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than two years specified in section 29b was unauthorized" (pp. 647-648).

Rosenthal v. *U. S.*, 248 Fed. 684, a decision of the Circuit Court of Appeals for the Eighth Circuit. There it was said:

> "The defendant, plaintiff in error, was indicted in two counts for false swearing, in a proceeding in bankruptcy, before the referee in bankruptcy. Each of the counts is for the same alleged offense; one count being evidently drawn under section 29b (2) of the Bankruptcy Act, and the other under section 125 of the Penal Code. There can only be one prosecution and conviction for one offense, and Congress undoubtedly was of the opinion that false swearing in bankruptcy proceedings is not equal in enormity to the crime of perjury, as the punishment for false swearing in a proceeding in bankruptcy is less severe, and the time within which the prosecution must be instituted two years less than that for the crime of perjury under section 125 of the Penal Code. It was so held in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37; *Kahn* v. *U. S.*, 214 U. S. 54, 130 C. C. A. 494; *Ulmer* v. *United States*, 219 Fed. 641, 134 C. C. A. 127. We therefore hold that the defendant could only be prosecuted under section 29b (2) of the Bankruptcy Act, and not under section 125 of the Penal Code" (p. 685).

(C) *Petitioner was erroneously convicted of subornation of perjury if the oath suborned did not amount to perjury.*

There is no real distinction between perjury and subornation of perjury as is expounded in the next point. Anyhow, there can be no subornation of perjury unless *perjury* be committed.

> *Epstein* v. *U. S.*, 196 Fed. 354, 356.
> *U. S.* v. *Wilcox*, 4 Blatch. 393.
> *People* v. *Teal*, 196 N. Y. 372.
> *Rex* v. *Hinton*, 3 Mod. 122; 87 Reprint 78.
> *Hawkins P. C.*, bk. 1, ch. 69, sec. 10.
> 1 *Russell Law of Crimes* (7th Eng. & 1st Can. Ed.) 527.

> "There being false swearings which are not perjuries, a procuring of their commission is not subornation of perjury" (2 *Bishop New Crim. Law*, §1197a).

(D) *The point is necessarily involved.*

It appears on the face of the indictment that the alleged false oath was taken in bankruptcy (R., pp. 8-12). The court ruled during the course of the trial that the prosecution was one for subornation of perjury (R., pp. 74-75). Motion to quash (R., pp. 62, 63) and motion to arrest judgment (R., p. 234) on this ground were denied, over exception.

It appeared by the evidence that the oath was taken in a bankruptcy proceeding (R., pp. 22-29). Motion to acquit on this ground was denied, over exception (R., pp. 62-63).

The errors are assigned (R., pp. 107-108).

II.

The Circuit Court of Appeals recognized that it is the rule that in prosecution for *perjury* the falsity of the oath must be proved by the direct testimony of two witnesses or by the testimony of one witness and corroborating circumstances, but they decided the rule does not apply in prosecution for *subornation of perjury*. This distinction is erroneous and is contrary to the settled law of England and contrary to all American decisions excepting those in Missouri.

A. *The question.*

The argument of the Circuit Court of Appeals appears at pages 130-134 of the record. We submit it is erroneous for these reasons.

At common law perjury was a *misdemeanor*, and all parties to misdemeanors were principals and were not classified as principals and accessories. Therefore the distinction between perjury and subornation of perjury was never more than *nominal* because the suborner, being accessory to the perjury, was guilty of the perjury itself: "perjury perpetrated by procuring another to do it [although] * * * honored in our law by the separate name of *subornation of perjury*, it is, in fact, *mere perjury*" (2 *Bishop New Crim. Law*, §1056).

> "The offense [subornation of perjury] is in substance the same as counselling or procuring the commission of the misdemeanor

> of perjury, and is punishable in the same manner as the principal offense under sect. 8 of the Accessories &c. Act. 1861"* (1 *Russell Law of Crimes* [7th Eng. & 1st Can. Ed.] 527).

Even where there is a statute separately defining subornation of perjury the suborner may be prosecuted for the perjury itself.

> *Comm.* v. *Smith*, 93 Mass (11 Allen), 243, 256-257.

Indeed, the perjurer and the suborner may be indicted and tried *together*, because the offense which they commit is the *same*.

> *Comm.* v. *Devine*, 155 Mass. 224, 226.
> 1 *Russell Law of Crimes* (7th Eng. & 1st Can. Ed.) 527.
> 30 *Cyc.* 1440.

Therefore it would be *illogical*, it would be *unreasonable* if the falsity of the oath could be proved by less evidence against the suborner than against the witness himself, particularly if they were tried *together*. Such is not the law. The *true* rule is that no matter against whom the prosecution is directed the *falsity* of the oath must be proved by something better than the testimony of a single witness, but *other* facts, such as the taking of the oath or its procurement by the suborner, can be proved like any other fact.

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* An act but declaratory of the common law (1 Russell Law of Crimes [7th Eng. and 1st Can. Ed.], 138).

English Law.

We have been unable to find any reported case in which the point was raised, but the English law is in harmony with the theory of this brief as is shown by the Perjury Act of 1911, which was intended to *codify* existing law.* It provides (§13):

> "A person shall not be liable to be convicted of any offense against this Act, or of any offense declared by any other Act to be perjury, or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

American Law.

The Supreme Judicial Court of Massachusetts has held in accordance with this view (*Comm.* v. *Douglass*, 46 Mass. [5 Metc.] 241). They said:

> "The defendant's counsel contends that the whole charge must be proved, either by two witnesses, or by one witness and by other independent evidence corroborative of his testimony. *It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named;* and in this respect no objection is made to the instructions of the court to the jury, and as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of said crime, we think it

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* 1 and 2 Geo. V, ch. 6. It is entitled "An Act to consolidate and simplify the law relating to perjury and kindred offenses."

> very clear that the same rule of evidence does not apply" (p. 243).

The court below quoted from the opinion in *Commonwealth* v. Douglass (R., p. 133) as sustaining their (the contrary) view, but they eivdently overlooked the language which we have italicized. They overlooked the *important* fact that the crime of "subornation of perjury," so called, contains two elements, viz., (1) the subornation, and (2) the perjury actually committed, and thus they failed to observe the *distinction* the Massachusetts court made between (1) the degree of proof required to prove "that the crime of perjury was committed by the person therein named," and (2) the degree of proof required to prove the "subornation of perjury." The court below seems to have been *confused* by the phrase "subornation of perjury." They thought it was used by the Massachusetts court to connote the *entire* crime, whereas it is clear that it was used to indicate only *one element* of it.

We shall see a little later that it is this *same confusion* which is responsible for what little conflict there is in the law.

The Supreme Court of Georgia, in an opinion by Mr. Justice Lamar, held in accordance with the theory of this brief. He wrote:

> "The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did. State v. Renswick, 88 N. W. 22. *It is, however, necessary to show that the person suborned did actually commit the crime of perjury, and as to that portion of the case the court properly charged that the general rule as to perjury would apply, and two witnesses, or one wit-*

> *ness and corroborating circumstances, would be necessary to establish the fact of perjury.* Comm. v. Douglass, 5 Met. 241; 2 Roscoe's Cr. Ev. 1079, 864" (*Stone* v. *State,* 118 Ga. 705, 717).

The Georgia Court of Appeals in *Bell* v. *State,* 5 Ga. App. 701, reasserted the rule. They stated it admirably, viz.:

> "The crime of subornation of perjury consists of two essential elements—the commission of perjury by the person suborned, and wilfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. The code of this State, following the universal rule on the subject, prescribes the quantum of evidence required in proof of perjury. This rule is that to convict of this offense the fact of perjury must be established by the testimony of two witnesses, or by that of one witness and corroborating circumstances. Penal Code, §991. Of course, this rule applies only to proof of the fact alleged to have been falsely sworn to, and not to other ingredients which constitute the offense, such as the act of swearing and the giving of the testimony assigned as perjury * * *" (p. 703).
>
> "The second element of the offense of subornation of perjury, to wit, the fact of subornation, according to the Supreme Court in the case of *Stone* v. *State,* 118 Ga. 717 (45 S. E. 626, 98 Am. St. R. 145) stands on an entirely different footing. 'The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did.' *In other words, while*

> *the offense of perjury must be shown by two witnesses, or one witness and corroborating circumstances, the fact that the person was suborned to commit the offense of perjury is sufficiently shown by the testimony of the suborned witness*" (p. 704).

The Supreme Court of Kansas has cited and approved what was said in *Stone* v. *State* (*State* v. *Wilhelm*, 114 Kan. 349, 353), though the precise point was not involved, since the falsity of the oath was there proved by *circumstantial* evidence —a method which does not involve the balancing of one oath against another (*People* v. *Doody*, 172 N. Y. 165, 172). Yet their dictum approving the reasoning of the Georgia court indicates their *instinct* in the matter.

The Supreme Court of Iowa, in *State* v. *Waddle* (100 Ia. 57), took the same view. That was a prosecution for *incitement* to commit perjury, i. e., it differed from a *subornation* case in that the perjury was *not* committed. They said:

> "It must be remembered, however, that in this case there is not one oath against another. Neither Lizzie Seadore nor any other person has ever made oath that Watts is the father of the child. If Lizzie Seadore had so sworn, by the procurement of the defendant, then the prosecution must have been under section 3937* *and the rule* [viz., the 'two witness' rule] *would apply, for there would be one oath against another*" (p. 60).

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* Iowa Code of 1873, § 3937; Iowa Code of 1924, § 13166, defining "subornation of perjury."

The Supreme Court of Delaware has ruled to the same effect.

State v. *Fahey,* 3 Pennew. 295.

The Supreme Court of Minnesota (*State* v. *Renswick,* 85 Minn. 19, 20) reached the result for which we contend, though on a different ground; the theory of the decision being that the perjurer and the suborner are accomplices as to the false testimony and the Minnesota statute requires an accomplice to be corroborated.

The foregoing are *all* of the American decisions which we have been able to find (with two exceptions in Missouri *contra,* which we shall discuss presently) which decide or assert *anything* on this point.

The first of these cases, cited and quoted by the court below (R., pp. 133-134), is *State* v. *Richardson,* 248 Mo. 563, a decision of the second division of the Supreme Court of Missouri. Examination of the opinion shows that a *number* of witnesses testified to facts showing the oath to have been taken falsely (pp. 566-567), so that whatever was said on the point was *dictum,* and unfortunately the defendant filed no brief in the Supreme Court, nor was he represented by counsel (p. 568). While recognizing that some decisions and text writers "hold or infer that as to the proof of the element of perjury the witness should be corroborated," the court reached a contrary view, saying:

> "He [the suborner] is not convicted of an offense occurring while he is under oath and testifying. The offense that he commits is virtually consummated before the witness gives his testimony. He is not charged with the giving of false testimony" (p. 571).

The court overlooked the fact, we believe, that the *false oath actually taken* is an *essential part* of the suborner's offense, a fact so plainly pointed out by the Georgia Court of Appeals in *Bell* v. *State, supra,* and so clearly recognized by the cited decisions from Massachusetts and Iowa. The suborner's offense is not "virtually consummated before the witness gives his testimony," becaue unless the witness *does* give false testimony the offense of "subornation of perjury" is *not* committed. Whether it be the perjurer or the suborner that is prosecuted the state must prove as an *essential part* of its case the *oath* of the person suborned, and if but one witness asserts that oath to have been false, the "oath against oath principle," which is at the basis of the rule, inevitably asserts itself.

U. S. v. *Wood*, 39 U. S. (14 Pet.) 430, 438, 439.

4 *Wigmore on Ev.* (2nd Ed.), §2040.

The same court recently cited and followed *State* v. *Richardson* without making any new analysis of the merits (*State* v. *White*, 263 S. W. 192, 194).

In addition to this decision of the Supreme Court of Missouri, the court below referred to two federal decisions and three text book declarations. We shall now examine them.

U. S. v. *Thompson*, 31 Fed. 331 (R., p. 131). Judge Deady, in writing that opinion, did not have in mind this rule of evidence at all. That is shown by the head-note which *he* wrote, saying *nothing* about it. Not once in the opinion did he mention it. He discussed only the rule dealing with the sufficiency of the uncorroborated testimony of *ac-*

complices. He decided that the perjurer is not an accomplice of the suborner. Whether he decided that question properly is immaterial here, and was *obiter* there, because the court found "on the evidence of Shepered, *which is corroborated by that of the defendant at every turn*, it is clear that the former committed perjury" (p. 335). But whatever the court *said* was addressed to the *accomplice* rule, and not to the *perjury* rule.

Boren v. U. S., 144 Fed. 801 (R., pp. 131-132). The point was not involved, because there was corroboration. The court wrote:

> "If corroboration of testimony of the witnesses in this case as to their perjury in making the oaths was necessary, we find corroboration in the evidence which is in the record" (pp. 805-806);

where just preceding that the court wrote:

> "The reason of the rule in the form in which it is expressed does not apply to cases of subornation of perjury such as the present case for the reason that where the testimony does not consist of oath of one person against that of another"

it was thinking of proof of the act of subornation, and not of the falsity of the testimony. This is plain. It is shown not only by the language, but *by the reason given.* Proof of the act of subornation does not involve "the oath of one person against that of another," but proof of falsity does. The court was using the term "subornation" in the same limited sense in which it is used in the Massachusetts and Georgia decisions.

The quotations from *Wigmore on Evidence* and 2 *Bishop Crim. Law* (R., pp. 130-131) cite nothing but *State* v. *Richardson, supra,* and are entitled to no more weight than that single decision, opposed as it is by every other decision in the country. The matter quoted from *Bishop* was not in that learned writer's text, but was inserted by the editors of the 9th Edition, and is but a condensation of the opinion in *State* v. *Richardson*, which alone it cites.

The quotation from 30 *Cyc.* 1454 (R., p. 131) was intended to apply to proof of *subornation* rather than to proof of *falsity.* This is shown by the authorities it cites, viz., *State* v. *Waddle, Kahn* v. *Douglass, State* v. *Renswick, Boren* v. *United States* (all discussed above) and *U. S.* v. *Thompson* (also discussed), which is clearly out of point. Not one of these cases decides that although an uncorroborated witness is insufficient on the issue of falsity as against the perjurer he is sufficient as against the suborner.

To summarize, a careful search of all of the authorities both in England and the United States reveals that every time this point has been raised (until the decision below), it has been decided in accordance with the theory of this brief, with the single exception of the two decisions of the State of Missouri. The weight of evidence is clearly against the decision of the court below. Good reason is against it. The rule of proof ought not to depend on the *name* by which the prosecution is called. The *nature of the problem* is the thing which ought to control. And when that problem requires proof that an oath has been falsely taken, the law insists that such falsity be proved by something better than the oral testimony of a single

witness. We are not now concerned with the history of the rule. It is firmly fixed in the law. Whatever may be said in criticism of it, practical results founded in experience seem to justify it (4 *Wigmore on Evidence* [2nd ed.], sec. 2041). So whether the prosecution be called one for "perjury," or whether it be called one for "subornation of perjury"—which, as we have seen, is precisely the same thing—part of the problem is, was an oath *falsely* taken? The rule is that that problem *whenever met* requires for its solution better proof than the mere say-so of one man.

(B) *The importance of the question.*

The rule is of such importance to prosecution for subornation of perjury that it is certain to arise again and again. The fact that the precedents are not more numerous can only be because the application of the rule has seldom been challenged. Certainly that explains the fact that there seems to have been nothing written in England on the subject until the law was codified in 1911.

The decision below is the first definite *precedent* in the federal courts. It makes *new law*. It *upsets* a generally accepted rule. The point is one which, by its nature, cannot fail to arise many times. With this *precedent* on the books, with practically all the state decisions opposed to it, confusion is certain to result in the District Courts until the point be finally determined. Sooner or later this court will have to decide it. It will save much confusion if it be done now.

(C) *The point is necessarily involved.*

The point was raised by motion to acquit at the end of the government's case and again at the end of the whole case (R., pp. 61, 63), and by request for a definite instruction, all denied over exception and by exception to an instruction to the contrary (R., pp. 76, 77).

The errors are assigned (R., pp. 107, 111, 112).

III.

Whether this prosecution must be considered as one for subornation of perjury, as the trial court ruled it to be, or whether it can be regarded as one for the different offense of false swearing in bankruptcy, the exceptions discussed in the preceding point require the judgment to be reversed.

The trial court ruled that the prosecution was one for subornation of perjury (R., pp. 74-75). The Circuit Court of Appeals, as its opinion between pages 125 and 128 show, took the same view. This being so, we do not believe the record can be examined now to determine whether the indictment states and the evidence shows the *different* offense of false swearing in bankruptcy.

U. S. v. *Staloff*, 260 U. S. 477, 481.
San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 96-97.
United Press v. *New York Press*, 35 App. Div. 444, affd. 164 N. Y. 406.
3 *C. J.* 718, 723.
17 *C. J.* 203.

But if we err in this, the exceptions discussed in the preceding point are decisive nevertheless. The rule that the falsity of the oath must be proved by something better than the uncorroborated testimony of a single witness applies, and for the same reasons in prosecution for false swearing as well as in prosecution for perjury.

Regina v. *Browning*, 3 Cox. C. C. 437, 438.
Aguierre v. *State*, 31 Tex. Cr. 517.
Comm. v. *Davis*, 92 Ky. 460, 462.

CONCLUSION.

The writ of certiorari should issue.

Dated, March 13, 1925.

Respectfully submitted,

ROBERT H. ELDER,
Counsel for Petitioner.

Notice of Submission.

PLEASE TAKE NOTICE that the foregoing petition and brief will be presented to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on the 23rd day of March, 1925, at the opening of court on that day, or as soon thereafter as counsel may be heard.

Dated, March 13, 1925.

Yours, etc.,

ROBERT H. ELDER,
Counsel for Petitioner.

Service of the foregoing is admitted the 16 day of March, 1925.

JAMES M. BECK

Solicitor General.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 317.

CHARLES HAMMER,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONER.

ROBERT H. ELDER,
OTHO S. BOWLING,
of Counsel for Petitioner.

The Hecla Press, 57 Warren St., N. Y. Tel. Walker 1490.

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Supreme Court of the United States

CHARLES HAMMER,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF.

The Case Below.

This cause below, when in the District Court, is reported as *United States* v. *Hammer* (299 Fed. 1011); when in the Circuit Court of Appeals (Second Circuit) it is reported as *Hammer* v. *United States* (6 Fed. [2d.] 786).

Jurisdiction of This Court.

This case is a criminal cause and comes here by writ of certiorari to the Circuit Court of Appeals, granted April 13, 1925 (R. 75; *Hammer* v. *United States*, 267 U. S. 591) (Jud. Code, §§ 128, 240).

Statement of the Case.

Petitioner, Hammer, was indicted in the United States District Court for the Southern District of New York

of subornation of perjury (R. 1-10). There were three counts to the indictment. At the end of the government's case the court directed a verdict for defendant on the first and third counts (R. 36-37). The remaining count (R. 4-7) alleged, in brief, that Annie Hammer was adjudicated a bankrupt and the proceeding sent to a referee; that Hammer suborned Trinz to appear before the referee and to be sworn and, contrary to his oath, to state material matter which neither Trinz nor Hammer believed to be true; that Trinz did appear before the referee and was sworn; that it became material to inquire whether Trinz had loaned money to the bankrupt and whether the bankrupt had given him a note; that Trinz, in consequence of the subornation, swore that he had loaned the bankrupt money and had received from her a note, whereas the truth was otherwise, as both Trinz and Hammer knew.

At the trial the government called the referee (Thayer) who testified that Trinz was sworn, and testified before him (R. 12-17). There was read into evidence (the presence of the stenographer had been waived [R. 11]) the stenographer's transcript of the testimony of Trinz from which it appeared that Trinz had testified before the referee that he had loaned money to the bankrupt and had received a note from her (R. 18-19). The government then called Trinz. Trinz testified that he did not loan the bankrupt anything (R. 26-27). He mentioned a conference at which defendant was present during which there was talk about Trinz becoming a witness before the referee. After much coaxing, a great deal of leading, and some threatening (R. 29-31) the prosecutor succeeded in getting Trinz to say, "I was just to go up to the referee in Yonkers and testify, and state that I did not know exactly, or something, but money was loaned to me and so forth, or her, I did loan money to her * * * I was told not to worry and to state that I did not know when

the money was loaned to Mrs. Hammer by me, and I did not know it particularly * * *. Well, in general he said I was to say I gave money at various times and I did not know exactly the date and so forth" (R. 32).

At the conclusion of the case defendant raised the points (1) that a false oath in *bankruptcy* is not *perjury*, but a *distinct* offense, and therefore subornation of a false oath in bankruptcy cannot be subornation of *perjury*, and (2) there was *no proof* that Trinz's oath before the referee in bankruptcy was *false* except the testimony of Trinz himself, and the law requires such falsity to be proved by something *more* than a single witness. The points were raised by motions for a directed verdict, to dismiss the indictment (R. 37-38), by request for instructions (R. 45-46) and in arrest of judgment (R. 46-47) and severally denied over exception.

Specification of Assigned Errors Intended to be Urged.

We rely upon these assignments of error:

No. 12 (R. 60), viz., that the court erred in refusing to direct a verdict at the end of the government's case.

Nos. 13 and 15 (R. 60), viz., that the court erred in refusing to direct a verdict at the end of the whole case.

No. 14 (R. 60), viz., that the court erred in refusing to dismiss the indictment.

No. 18, (R. 62), viz., that the court erred in instructing the jury that they might convict although the testimony of Trinz which defendant was accused of having suborned was shown to be false by Trinz's uncorroborated testimony alone.

BRIEF OF THE ARGUMENT.

I.

The prosecution was for subornation of perjury. The taking of a false oath in bankruptcy is not perjury, but a different offense. There cannot be subornation of perjury without *perjury*. From this it follows that (a) the indictment does not state a crime, since it appears on the face thereof that the false oath stated to have been suborned was taken in bankruptcy, hence the court erred in denying the motions to dismiss the bill and to arrest judgment upon it; and (b) the evidence does not prove subornation of perjury, since the false oath alleged to be suborned was proved to have been taken in bankruptcy, hence the court erred in denying defendant's motion to direct a verdict.

Motion to dismiss indictment at end of government's case and exception, R. 37-38.

Motion to dismiss indictment at end of whole case and exception, R. 38.

Errors assigned (No. 14), R. 60.

Motion in arrest of judgment and exception, R. 46-47.

Error assigned (No. 22), R. 63.

Motion to direct verdict at end of government's case and exception, R. 37-38.

Motion to direct verdict at end of whole case and exception, R. 38.

Errors assigned (Nos. 12, 13, 15), R. 60.

The point was brought to the court's attention by counsel for defendant at the end of the government's case in this manner:

> "Now, if your Honor please, I move that your Honor direct a verdict of not guilty and also move that your Honor dismiss this indictment on the ground that it appears without dispute in the evidence that this alleged false swearing occurred in a proceeding in bankruptcy, and that that is not perjury under the United States statutes. It might be a violation of Section 29 of the Bankruptcy Act, but that is not perjury, and that therefore, for false swearing in a bankruptcy proceeding there can be no prosecution for perjury. There is no such crime as subornation of perjury based upon false swearing in violation of Section 29 of the Bankruptcy Act" (R. 37-38).

Theory of This Point.

The perjury statute was the earlier act. It is a general act. The later special Bankruptcy Act defines the offense of taking a false oath in bankruptcy and prescribes the punishment for it, which differs from the punishment for perjury; it prescribes a period within which prosecutions for the offense may be begun, which is not the same period which limits prosecutions for perjury; it indicates in other ways that when the bankruptcy law was enacted it was the intention of Congress to create a new offense, and not to define a new way in which the existing offense of perjury might be committed. Therefore Trinz, by taking a false oath in bankruptcy, did not commit *perjury*. And if Trinz was not guilty of *perjury* defendant could not have been guilty of *subornation of perjury*.

EXPOSITION.

If Trinz did not commit *perjury*, defendant could not have committed subornation of perjury.

Epstein v. *U. S.*, 196 Fed. 354, 356.
U. S. v. *Wilcox*, 4 Blatch 393.
Rex v. *Hinton*, 3 Mod. 122, 87 Reprint 78.
People v. *Teal*, 196 N. Y. 372, 376.
Hawkins, Pleas of the Crown, bk. 1, ch. 69, § 10.
1 *Russell, Law of Crimes* (7th ed.) 527.

"There being false swearings which are not perjuries, a procuring of their commission is not subornation of perjury" (2 *Bishop New Crim. Law*, § 1197-a).

Is it *perjury* to swear falsely in *bankruptcy?*

The distinction between perjury and false oaths not amounting to perjury goes back to antiquity. At common law a material false oath taken in a judicial proceeding was perjury; other false oaths, if in a matter of public concern, were punishable, but were not *perjury*.

2 *Bishop New Crim. Law*, § 1014.
1 *Russell, Law of Crimes* (7th ed.) 528-529.
30 *Cyc.* 1400-1401.

Congress not unfrequently has defined instances where false oaths are punishable, but *not* as *perjury*, e. g.:

Crim. Code, § 80 (naturalization).
36 *Stat.* 117, par. Eighth (corp. excise tax).
36 *Stat.* 1015, ch. 200 (national parks).
38 *Stat.* 771, par. F (income tax).
39 *Stat.* 775, §18 (income tax).
40 *Stat.* 441, §200 (2) (military service affidavit).

Let us now compare the perjury statute with the bankruptcy act, and interpret them.

The perjury statute is Crim. Code, §125 (35 Stat. 1111). It reads:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years."

The statute for false oaths in bankruptcy is Bankruptcy Act, § 29-b (30 Stat. 554). It reads:

> "*A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently* (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) *made a false oath or account in, or in relation to, any proceeding in bankruptcy;* (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings."

The perjury statute is the older. It was in effect as R. S. 5392 when the Bankruptcy Act was enacted. Thus we have an earlier general act, followed by a later special act, each act comprising a definition of an offense and pre-

scribing a penalty for it. The rule of interpretation in such a case is that the later special act removes such offenses as are covered by it from the operation of the earlier general act.

> *U. S.* v. *Tynen*, 11 Wall. 88, 95.
> *Lewis' Sutherland on Statutory Construction*, pp. 480-481.

So far as two statutes cover the same ground, the later must be deemed to have superseded (and so repealed) the former, because

> "the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and * * * the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law" (*Lewis' Sutherland on Statutory Construction*, p 481).

Then, too, the later act (Bankruptcy Act) fixes the lesser penalty, and

> "in construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty" (*U. S.* v. *Yuginovich*, 256 U. S. 450, 463).

It may not be speaking with precision to refer to the Bankruptcy Act as having *pro tanto* "repealed" the perjury statute, because at the time the later statute was enacted the perjury statute did not cover false oaths in bankruptcy proceedings for the good reason that there were no bankruptcy proceedings—there had not been a bankruptcy act in effect since 1878 (20 Stat. 99, repealing Bankruptcy Act of 1867 [14 Stat. 517]). But the same principle of inter-

pretation applies. It indicates a legislative purpose to create a new offense, and not to create a new species of the existing crime of perjury.

The *language* chosen also indicates such purpose. The word *perjury* is not used in the bankruptcy act. On the other hand, it says that a person shall suffer a stated punishment "upon conviction of *the* offense of having knowingly and fraudulently

(1) concealed while a bankrupt * * *
(2) made a false oath or account * * *
(3) presented under oath any false claim * * *
(4) received any material amount or property from the bankrupt * * *
(5) extorted or attempted to extort any money or property * * *."

Thus the draughtsman considered these five varieties of misconduct in bankruptcy as different forms of one general offense. We cannot suppose that he intended to make one variety of "*the* offense" so defined identical with the crime interdicted by R. S. 5392 (now Crim. Code § 125), viz., perjury.

Looking at the section as a whole, we see that the purpose was to create a scheme, complete in itself, without requiring reference to any other statute for the punishment of every kind of misconduct in bankruptcy. The scheme was to create three offenses.

Subdivision (a) defines "the offense" which can be committed by a trustee. That subdivision reads:

> "A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee."

Subdivision (b), which we have already quoted, defines "the offense" which may be committed by a person neither trustee nor referee.

Subdivision (c) defines "the offense" which may be committed by a referee (and in one instance by a trustee). That subdivision reads:

> "A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do."

This view gains further support by subdivision (d) of the section, wherein is defined the period of limitation. The language there chosen is:

> "A person shall not be prosecuted for any offense *arising under this act* unless the indictment is found or the information is filed in court within one year after the commission of the offense."

Which shows that the draughtsman considered false swearing in bankruptcy as an offense *arising* under the Bankruptcy Act, and not one arising under the statute defining perjury.

Other differences indicate that the offenses are distinct.

First, the penalties are different, the punishment for perjury being imprisonment for not more than *five* years *plus* a fine of not more than $2,000, and the punishment for a false oath in bankruptcy being not more than *two* years *without* any fine.

Second, the periods of limitation are different. Perjury may be prosecuted within *three* years (R. S. 1044). False swearing in bankruptcy must be prosecuted within *one* year (Bankruptcy Act, § 29-d).

Third, *materiality* is essential to perjury. It is not an element of the offense defined by the Bankruptcy Act.

Criticism of the Opinion Below.

The Circuit Court of Appeals referred to its earlier decision in *Wechsler* v. *U. S.* (158 Fed. 579). This decision, the court said, "is still the law of this Circuit and we adhere to it and believe it to have been properly decided" (R. 70). In the *Wechsler* case, the argument is as follows:

> "It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of either of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter which he did not believe to be true. When a person states matter which he does not believe to be true 'wilfully and contrary to his oath,' he may certainly be said to make a false oath 'knowingly and fraudulently.' We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the cita-

> tion of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty" (pp. 580-581).

The rule of construction which the court applied might have been correct if the Bankruptcy Act, by reference or otherwise, indicated that the *definition* of the offense for which it was prescribing a special punishment was to be found in the perjury statute. But the Bankruptcy Act does no such thing. It is complete in itself. It both defines and punishes.

If the reasoning of the court below were correct, if the Bankruptcy Act defined punishment only, then if Crim. Code § 125 should be repealed, one who made a false oath in bankruptcy could not be prosecuted at all, notwithstanding the continuance of the Bankruptcy Act saying:

> "A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently * * * made a false oath in * * * any proceeding in bankruptcy."

Can this be so? Can there be any doubt that false oaths in bankruptcy could be prosecuted under § 29-b no matter what happened to Crim. Code § 125? Because definition and punishment are both there. And if a false oath in bankruptcy can be prosecuted independently of the perjury statute, then such an oath is not *perjury*.

Other Decisions in Point.

(a) *Second Circuit.* Two decisions, *Kahn* v. *U. S.* (214 Fed. 54) and *Schonfeld* v. *U. S.* (277 Fed. 934) seem inconsistent with the decision below. In the *Kahn* case the court said:

> "It is said, however, that their falsity [of the statements assigned as perjury] was not shown by the clear and convincing proof necessary in perjury cases, which the defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special provision of the Bankruptcy Act making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and fraudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed, there was on our statute books, and had been for over a hundred years, a general perjury statute (now sec. 125 of the Criminal Code * * *) which provides that a person found guilty under its provisions 'shall be fined not more than two thousand dollars and imprisoned not more than five years.'
>
> If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for sec. 29b (2) at all? The fact that the word *perjury* [sic] does not appear in the later act and that the term of imprisonment was reduced from five years to two years and the $2,000 fine omitted altogether, makes it clear that Congress in the Bankruptcy Act was dealing with a crime not in its judgment so aggravated as the crime of perjury" (p. 56).

In the opinion below the court referred to this language as "some unguarded expressions" (R. 70).

In the *Schonfeld* case the court said:

> "False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. Kahn v. United States, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing" (pp. 938-939).

The opinion below does not refer to this decision.

In *Epstein* v. *U. S.* (271 Fed. 282) the same court had before it a conviction for perjury, the oath having been taken in a bankruptcy proceeding, but this point was neither raised nor considered.

(b) *Sixth Circuit.* In *Ulmer* v. *U. S.* (219 Fed. 641) the Circuit Court of Appeals for the Sixth Circuit said:

> "If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial * * *; but the prosecution cannot be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *U. S.*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, § 29b (2), so as to charge that Ulmer 'made a false oath in and in relation to a proceeding in bankruptcy.' We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *U. S.*, 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution

as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than two years specified in section 29b was unauthorized" (pp. 647-648).

(c) *Seventh Circuit.* In *Epstein* v. *U. S.* (196 Fed. 354) the Circuit Court of Appeals for the Seventh Circuit said:

> "In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is exactly as if there were only one section denouncing and punishing perjury, as follows:
>
> 'Whoever, having taken an oath * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years; Provided, that if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years' " (pp. 356-357).

This argument ignores the omission of the word "perjury" in the Bankruptcy Act, it ignores the context of section 29 of that act, which throws much light upon subdivision b (2), it ignores the fact that the Bankruptcy Act denounces and punishes *all* oaths whether material or not. The proviso in the court's hypothetical statute, when compared word for word with § 29-b (2) of the Bankruptcy Act, shows no resemblance whatever. Yet, if Congress had

intended to effect the result contended for, language similar to that used in the court's imaginary act would have been so natural, so certain to come to mind, that the use of very different language is most significant.

II.

If a false oath in bankruptcy can be prosecuted as perjury, then the rules of evidence governing perjury prosecutions apply. One of these rules is that the falsity of the oath cannot be proved by the uncorroborated testimony of a single witness. Here the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz, saying that what he swore to before the referee was not true. Moreover, the district judge charged the jury that it was not necessary for them to find corroboration on this issue. The Circuit Court of Appeals held that this rule of evidence does not apply to prosecutions for *subornation* of perjury. The distinction is erroneous.

How the Point Arose.

Trinz testified before the referee that he loaned the bankrupt money (R. 18-19). This is the false oath alleged to have been suborned (R. 6-7). On this trial, Trinz testified that he did not loan the bankrupt money (R. 23). There was not a suggestion of corroboration.

At the end of the government's case defendant's counsel moved for a directed verdict

> "on the ground that this is an indictment for subornation of perjury, and there is the testimony of but one witness here in which it is alleged the perjury arose. The law requires that there should be the testimony of one direct witness with corroborating circumstances, and that there are no corroborating circumstances" (R. 32).

The motion was denied (R. 38). Defendant rested and renewed the motion (R. 38). It was denied over exception.

Errors assigned (Nos. 12, 13, 15), R. 60.

Counsel then requested an instruction as follows:

> "Mr. Elder: I request your Honor to charge the jury that this crime charged being subornation of perjury, that they cannot find the defendant guilty upon the testimony of Trinz uncorroborated or independent of facts and circumstances which tend to show that the testimony which he gave or says he gave before Referee Thayer was false.
>
> * * * * * * *
>
> "The Court: An accomplice need not be corroborated.
>
> Mr. Elder: It is not a question of an accomplice. I except to that. I do not want, your Honor, to be misunderstood in this. This is not a question of an accomplice. It is the old common law rule, that in perjury and subornation of perjury, the testimony of one witness that the alleged subject matter of the perjury was false is not sufficient. The old rule was that there had to be two direct witnesses to the falsity of testimony. That has been modified by modern decisions, and now they say there has to be one direct witness to the falsity of the testimony and corroborative circumstances which tend to support it.

Now I request your Honor to charge that unless there be such independent corroborative circumstances in this case, then the jury must find the defendant not guilty.

The Court: We are agreed, but you (the jury) are not to understand, gentlemen, that the court charges you that there is no such independent corroborating testimony in this case.

Mr. Elder: I take exception to the qualification of your Honor.

* * * * * * *

Mr. Wolff: I ask your Honor to charge the jury the law does not require that there be corroboration of the testimony of Trinz. That if they believe what Trinz said to be the truth that is sufficient.

The Court: There you are squarely apart.

Mr. Elder: Yes, sir.

The Court: Very well; the motion of the government is granted; you have a clear exception to that part of it, Mr. Elder.

Mr. Elder: Thank you" (R. 45-46).

Error assigned (No. 18), R. 62.

The instruction first given was erroneous, coupled as it was with the statement that the jury might find corroboration where there was clearly none, but, as the Circuit Court of Appeals well said (R. 69), this was withdrawn by his subsequent instruction at the request of Mr. Wolff (Assistant United States Attorney) that no corroboration was required. So the point was squarely raised.

Theory of This Point.

The rule that in prosecution for perjury the falsity of the oath must be shown by something better than the uncorroborated testimony of a single witness arises out of the theory that when there is "oath against oath" and nothing more, the case is not proved. The rule applies to prosecutions for subornation of perjury, because perjury and

subornation of perjury are really the same offense, and, anyhow, when there is a single witness there is "oath against oath," no matter what *name* the offense on trial be given. All of the decisions are to this effect, excepting those in Missouri, which were not, we believe, well decided.

EXPOSITION.

Prosecution for either perjury or subornation of perjury requires proof that a particular oath was false. When that oath is controverted by the oath of a single witness and nothing more, then there is "oath against oath," which is the theory behind the rule. So no matter whether the prosecution be against the suborner or against the witness himself it must traverse ground where the "two witness rule" in perjury, so called, holds sway.

Thus, the *raison d'être* of the rule, viz., "oath against oath," indicates the extent of its application and becomes important. That "oath against oath" is the essential principle of it is seen clearly from a brief review of its history.

In early times an oath, like ordeal or wager of battle, was regarded as efficacious *per se* (4 *Wigmore on Ev.*, § 2932). This notion must not be dismissed as primitive. It persists to this day. It is at the basis of our hearsay rule; it explains the many exceptions to that rule which arise out of the principle that some circumstances give declarations trustworthiness equal, or nearly so, to an oath, such as dying declarations in homicide cases, spontaneous declarations following an accident or injury (usually referred to as *res gestae*), declarations against financial interest, etc. The same notion persists in our theory that uncontradicted testimony must ordinarily be accepted as true.

Quong Ting v. *U. S.*, 140 U. S. 417, 420.
Second National Bank v. *Weston*, 172 N. Y. 250, 258.
People v. *Davis*, 269 Ill. 256, 270-271.

The two witness rule of the ecclesiastical courts, fortified as it was believed to be by scripture, was equally a rule of the early common law (*Thayer, Preliminary Treatise on Ev.*, p. 87, citing *Mirror*, lib. 5, ch. 1, § 136), but it did not prevail in *practice* in the common law courts because the jurors of those days were primarily witnesses, and, being witnesses, they could return a verdict without any outside testimony at all. The two necessary witnesses were always present among the jurors themselves (4 *Wigmore on Ev.*, § 2032).

Now perjury was not originally a common law offense. It was deemed a sin rather than a crime (3 *Stephen, Crim. Law of Eng.* 243) and as such was first attempted to be punished by the ecclesiastical courts (*Ibid;* 2 *Pollock & Maitland, Hist. Eng. Law* 541). It was first dealt with as a crime by the Court of Star Chamber. That court, because the statute conferring its most important jurisdiction upon it (3 *Hen. VII*, ch. 1 [1487]) referred to the "increase of murders, robberies, perjuries," and authorized Star Chamber to call before it "the said misdoers," proceeded to punish perjury (3 *Stephen, Crim. Law of Eng.* 244-247). Star Chamber was presided over by the Chancellor, and proceedings before him were conducted in accordance with the rules of the ecclesiastical or civil law, and particularly the rule of two witnesses obtained therein (4 *Wigmore on Ev.*, § 2040).

The common law courts did not entertain prosecution for perjury until Star Chamber was abolished and its jurisdiction conferred on Kings Bench in 1640 (16 Car. 1, ch. 10). And when the common law judges began to apply the law of perjury, it was natural that they should apply it as they found it, including the rule that two witnesses were necessary to convict. And this rule did not disappear in the thought that the necessary witnesses could be found among the jurors, because by this time the orig-

inal function of jurors as witnesses had been abandoned. But for the continuance of the rule the common law judges found an additional reason of their own. It was this: In ordinary cases the defendant was not competent to testify. Therefore if there was but one witness there was his testimony against nothing, and a case was made out. But in a perjury case the defendant's oath (the one asserted to be false) necessarily was put in evidence, and hence if there was but one witness to the falsity of that oath there was "oath against oath" and so no case was made out (4 *Wigmore on Ev.*, § 2040). Thus:

> "Parker, C. J., in summing up the evidence said, *inter alia*, there is a difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore a credible and proper witness shall turn the scales in favor of either party; but in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be strong and clear evidence, and more numerous than the evidence given for the defendant; for else *there is only oath against oath*" (*Reg.* v. *Muscot*, 10 Mod. 192, 194, 195, 88 Reprint 689, 690).

Whatever may be the importance of the history of the rule, certain it is that it remains law to this day and that the *oath against oath* theory continues as its support.

> 4 *Wigmore on Ev.*, §§ 2040-2041.
> *U. S.* v. *Wood*, 14 Pet. 430, 438-439.
> *U. S.* v. *Hall*, 44 Fed. (D. C.) 864, 868.
> *Hashagen* v *U. S.*, 169 Fed. (C. C. A., 8) 396, 399.
> *Clayton* v. *U. S.* 284 Fed. (C. C. A., 4) 537, 540.

Modern decisions permit the falsity of the oath to be proved by circumstantial evidence, or by public records, or by writings emanating from the defendant himself (*U. S.* v. *Wood*, 14 Pet. 430, 440; *People* v. *Doody*, 172 N. Y. 165, 172; *State* v. *Wilhelm*, 114 Kan. 349), since these methods do not involve the balancing of one oath against another, but where falsity is sought to be shown by direct testimony it is firmly settled in American law that something more than the oath of a single witness is required. Appended hereto is a list of the most recent decisions which we have been able to find in each American jurisdiction where anything has been written on the subject. They show that the "oath against oath" principle still prevails.

Some writers, such as Wigmore, criticize the rule as being "anomolous," while conceding that practical results, founded in experience, may justify its continuance (4 *Wigmore on Ev.* [2nd ed.], § 2041). This is a case where practical reasons are strong. There is no testimony but that of Trinz, who voluntarily testified one way before the referee, and then under pressure testified the other way on the trial below. So we have in evidence his two contradictory oaths, and nothing more. It has always been the rule that when contradictory oaths of one person are proved something more is required to get at the truth, because as Tindal, C. J., said, "If you merely prove the two contradictory statements on oath and leave it there *non constat*, which statement is the true one?" (*Regina* v. *Hughes*, 1. Car. & K. 519, 527).

To the same effect see:

People v. *Glass*, 191 App. Div. 483.
People v. *McClintock*, 191 Mich. 589, 600-601.
State v. *Burns*, 120 So. Car. 523.
Schwartz v. *Commonwealth*, 27 Gratt (Va.) 1025.

The Circuit Court of Appeals did not question this rule so far as prosecution for *perjury* is concerned. They held it does not apply to prosecution for *subornation of perjury*. We shall now examine that distinction.

At common law perjury was a misdemeanor, and all parties to misdemeanors were principals, and were not classified as principals and accessories. The suborner of perjury was an accessory before the fact to the perjury; therefore he was a principal in the commission of the perjury itself. Hence the distinction between perjury and subornation of perjury was at best only nominal.

> "* * * perjury perpetrated by procuring another to do it [although] * * * honored in our law by the separate name of *subornation of perjury*, it is, in fact, *mere perjury*" (2 *Bishop, New Crim. Law*, § 1056).
>
> "The offense [subornation of perjury] is in substance the same as counselling or procuring the commission of the misdemeanor of perjury, and is punishable in the same manner as the principal offense under section 8 of the Accessories & Act 1861* (1 Russell, Law of Crimes [7th ed.], 527)."

Even where there is a statute separately defining subornation of perjury the suborner may be prosecuted for the perjury itself.

> *Commonwealth* v. *Smith*, 93 Mass. (11 Allen) 243, 256-257.

So, under the statutes of the United States, since the punishment of subornation of perjury, so called, is the same as for perjury (Crim. Code, § 126), and since the distinction between principals and accessories is abolished (Crim. Code, §332) there can be no doubt that the suborner could be indicted and punished for the perjury itself.

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* An act but declaratory of the common law (1 *Russell, Law of Crimes* [7th ed.], 138).

Since their offenses are identical, the perjurer and the suborner may be indicted and tried together.

> *Commonwealth* v. *Devine*, 155 Mass. 224, 226.
> 1 *Russell, Law of Crimes* (7th ed.) 527.
> 30 *Cyc.* 1440.

Therefore it would be strange, it would be illogical, particularly if they were indicted and tried together, if the suborner could be convicted on less evidence than is required for the perjurer. And certainly as against either the oath alleged to be false would have to be proved and if there were but a single witness saying it was false there would be "oath against oath" so that a case would not be made out. On principle, therefore, there can be no reason for asserting that this rule of evidence applies against the perjurer but does not apply against the suborner. Neither do the decisions make any difference.

Authorities in Harmony With This View.

English Law.

We have been unable to find any reported case in which the point was raised, but the English law is in harmony with the theory of this brief as is shown by the Perjury Act of 1911, which was intended to *codify* existing law.* It provides (§ 13):

> "A person shall not be liable to be convicted of any offense against this Act, or of any offense declared by any other Act to be perjury, or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

* 1 and 2 Geo. V, ch. 6. It is entitled "An Act to consolidate and simplify the law relating to perjury and kindred offenses."

AMERICAN LAW.

The Supreme Judicial Court of Massachusetts has held in accordance with this view (*Commonwealth* v. *Douglass*, 46 Mass. [5 Metc.] 241). They said:

> "The defendant's counsel contends that the whole charge must be proved, either by two witnesses, or by one witness and by other independent evidence corroborative of his testimony. *It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named;* and in this respect no objection is made to the instructions of the court to the jury, and as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of said crime, we think it very clear that the same rule of evidence does not apply" (p. 243).

In passing let us note what was pointed out by the Massachusetts Court. A prosecution for perjury involves two things. First, the fact that *perjury* was committed. That involves "oath against oath" and the two-witness rule applies. Second, the act of *subornation*. That does not involve "oath against oath," because proof that defendant *induced* the testimony is not inconsistent with that testimony, whatever it may have been. Hence, as to the act of *subornation* a single witness suffices. We believe, as we shall point out later, that the learned court below misread the decisions upon which they relied which say that the "subornation" can be proved by a single witness. They misinterpreted the *word*, thinking "subornation" connotes the entire crime of "subornation of perjury," whereas it indicates only one element of it.

The Supreme Court of Georgia, in an opinion by Mr. Justice Lamar, reached the same conclusion (*Stone* v. *State*, 118 Ga. 705). He wrote:

> "The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did. State v. Renswick, 88 N. W. 22.* *It is, however, necessary to show that the person suborned did actually commit the crime of perjury, and as to that portion of the case the court properly charged that the general rule as to perjury would apply, and two witnesses, or one witness and corroborating circumstances, would be necessary to establish the fact of perjury.* Comm. v. Douglass, 5 Met. 241; 2 Roscoe's Cr. Ev. 1079, 864" (p. 717).

The Georgia Court of Appeals in *Bell* v. *State* (5 Ga. App. 701) reasserted the rule in excellent manner, viz.:

> "The crime of subornation of perjury consists of two essential elements—the commission of perjury by the person suborned, and wilfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. The code of this State, following the universal rule on the subject, prescribes the quantum of evidence required in proof of perjury. This rule is that to convict of this offense the fact of perjury must be established by the testimony of two witnesses, or by that of one witness and corroborating circumstances. Penal Code, § 991. Of course, this rule applies only to proof of the fact alleged to have been falsely sworn to, and not to other ingredients which constitute the offense, such as the act of swearing and the giving of the testimony assigned as perjury * * *" (p. 703).

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* 85 Minn. 19.

> "The second element of the offense of subornation of perjury, to wit, the fact of subornation, according to the Supreme Court in the case of *Stone* v. *State*, 118 Ga. 717 (45 S. E. 626, 98 Am. St. R. 145), stands on an entirely different footing. 'The suborner's act is not committed by means of his oath, and one witness is sufficient to establish what he did.' *In other words, while the offense of perjury must be shown by two witnesses, or one witness and corroborating circumstances, the fact that the person was suborned to commit the offense of perjury is sufficiently shown by the testimony of the suborned witness*" (p. 704).

The Supreme Court of Kansas in *State* v. *Wilhelm* (114 Kan. 349, 357) cited and approved what was said by Mr. Justice Lamar in *State* v. *Stone, supra*, though the precise point was not involved because falsity was proved in that case *circumstantially*.

The Supreme Court of Iowa in *State* v. *Waddle* (100 Ia. 57) took the same view. That was a prosecution for *incitement* to commit perjury, i. e., it differed from a *subornation* case in that the perjury was *not* committed. They said:

> "It must be remembered, however, that in this case there is not one oath against another. Neither Lizzie Seadore nor any other person has ever made oath that Watts is the father of the child. If Lizzie Seadore had so sworn, by the procurement of the defendant, then the prosecution must have been under section 3937* *and the rule* [viz., the 'one witness' rule] *would apply, for there would be one oath against another*" (p. 60).

The Court of General Sessions of Delaware has ruled to the same effect.

State v. *Fahey*, 3 Pennew. 295.

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*Iowa Code of 1873, § 3937; Iowa Code of 1924, § 13166, defining "subornation of perjury."

The Supreme Court of Minnesota in *State* v. *Renswick* (85 Minn. 19, 20) reached the result for which we contend, though on a different ground; the theory of the decision being that the perjurer and the suborner are accomplices as to the false testimony and the Minnesota statute requires an accomplice to be corroborated.

The foregoing are *all* of the American decisions which we have been able to find (with two exceptions in Missouri, *contra*, which we shall discuss presently) which decide or assert *anything* on this point.

Authorities in Conflict With This View.

The doctrine peculiar to Missouri was announced in *State* v. *Richardson* (248 Mo. 563) a decision of the second division of the Supreme Court of that state. Examination of the opinion shows that a number of witnesses testified to facts indicating the oath to have been taken falsely (pp. 566-567), so that whatever was said on the point was *dictum*, and unfortunately the defendant filed no brief in the Supreme Court, nor was he represented by counsel.

This is the argument of the court:

> "Mr. Best, in his work on evidence, gives as a further reason for the rule, that it has a tendency to cause a witness to testify with less apprehension or fear, and that by reason of the rule 'little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice' [Best on Evidence, secs. 605, 606; 3 Wigmore on Ev., § 2041]. By what course of logic can these reasons be made to apply to the case of a suborner? Why should the rule as to him be different from that applied in cases of larceny, rape, or other criminal offenses? The presumption of his innocence certainly is of no greater weight than in the case of one accused of larceny or rape. There is no public policy reason why his conviction should be made more difficult than in the majority of other

> felonies. He is not convicted of an offense occurring while he is under oath and testifying. The offense that he commits is virtually consummated before the witness gives his testimony. He is not charged with the giving of false testimony. He does not commit his crime while performing any necessary function in the progress of a trial. Why then should his conviction require greater proof than in convicting for theft? We do not think it does. All of the authorities hold that a single witness, uncorroborated, can make sufficient proof of the suborning" (pp. 570-571).

The error of the learned court is this: The suborner's offense is not "virtually consummated before the witness gives his testimony." The court was mistaken in asserting that "He is not charged with the giving of false testimony." Perhaps he commits *some* offense "before the witness gives his testimony," because it is a misdemeanor at common law to *incite* another to commit an offense which does not happen to be committed (1 *Russell, Law of Crimes* [7th ed.] 203), and it may be such in Missouri, but, as the Supreme Court of Iowa pointed out (*State* v. *Waddle, supra*), such offense is *not* subornation of perjury. That offense is not committed until perjury is committed. Therefore, the suborner *is* charged with "the giving of false testimony"; at any rate, as the Georgia Court of Appeals said (*Bell* v. *State, supra*), "The guilt of both the suborned and the suborner must be proved on the trial of the latter." And when the guilt of the perjurer is being proved on the trial of the suborner, the "oath against oath" principle asserts itself. This principle, of course, is the reason for the rule. We do not understand that Mr. Best's theory that it permits a witness to testify more freely (which theory seems to have influenced the decision) really has anything to do with it.

The same court recently cited and followed *State* v. *Richardson* without making any new analysis of the merits (*State* v. *White*, 263 S. W. 192, 194).

A Criticism of the Opinion of the Circuit Court of Appeals.

The opinion of the learned Circuit Court of Appeals, although not doubting the "one witness" rule in perjury prosecutions overlooked, it seems, the reason supporting the rule. They seem to have regarded it as arising out of the theory that "the crime is so heinous as compared with other crimes that in order to convict it is necessary that there should be at least one witness and that he must be corroborated * * *" (R. 71). But the atrocity of the crime had nothing to do with it, as we have seen. It arose out of the "oath against oath" doctrine. Having overlooked that doctrine, it was easier for the learned court to fall into error.

The court attempted no independent analysis of the question. It quoted from four cases and three text books, basing its decision upon their authority. We shall now examine them.

The first case it quoted is *U. S.* v. *Thompson* (31 Fed. 331). But Judge Deady, in writing that opinion, did not have in mind this rule of evidence at all. That is shown by the headnote which *he* wrote, saying *nothing* about it. Not once in the opinion did he mention it. He discussed only the rule dealing with the sufficiency of the uncorroborated testimony of *accomplices*. He decided that the perjurer is not an accomplice of the suborner. Whether he decided that question properly is immaterial here, and was *obiter* there, because the court found "on the evidence of Shepered, *which is corroborated by that of the defendant at every turn*, it is clear that the former committed perjury" (p. 335). But whatever the court *said* was addressed to the *accomplice* rule, and not to the *perjury* rule.

The second case cited is *Boren* v. *U. S.* (144 Fed. 801) (R. 72). The point was not involved in that case either. The testimony of the witness as to the act of perjury was amply corroborated. The court said:

> "If corroboration of testimony of the witnesses in this case *as to their perjury* in making the oaths was necessary, we find corroboration in the evidence which is in the record" (pp. 805-806).

This makes it clearer that when the court used the words "subornation of perjury" in that portion of the opinion which the court below quotes it was thinking of the *act* of subornation; it was using the word in the same limited sense in which it is used in the Georgia and Massachusetts decisions quoted *supra*. This is plain from this sentence:

> "The reason of the rule in the form in which it is expressed does not apply to a case of subornation of perjury such as the present case for the reason that here the testimony does not consist of the oath of one person against that of another" (p. 805).

Proof of *subornation* does not involve "oath against oath," but proof of *falsity* does.

The third case cited is *Commonwealth* v. *Douglass* (46 Mass. [5 Mete.] 241) (R. 73), discussed above. We believe the court below misapprehended this language, though they quoted it:

> "It is admitted that such evidence is necessary to substantiate that part of the indictment *which alleges that the crime of perjury was committed* * * *" (p. 243).

The last case cited is *State* v. *Richardson* (248 Mo. 563) (R. 73-74) which we have already considered.

The court also quoted from Wigmore, Bishop and Cyc. (R. 72).

The quotation from Wigmore shows, we believe, that learned writer had in mind the *act* of subornation, not the whole offense, for his reason is

> "for the *act* of subornation does not involve the theory of oath against oath, and the perjury [i. e., the fact of *testifying*] may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution" (§ 2042).

Wigmore cites only *State* v. *Richardson, supra.*

The quotation from Bishop was not in the author's edition of that work, but was inserted by the editors of the ninth edition. It cites nothing but *State* v. *Richardson, supra,* and the quotation will be recognized as having been inspired by that decision.

The quotation from Cyc. refers to the *act* of subornation. This is shown by the cases cited, viz.: *State* v. *Waddle, Comm.* v. *Douglass, State* v. *Renswick, Boren* v. *U. S.* (all discussed above) and *U. S.* v. *Thompson* (also discussed) which is not in point.

To summarize: a careful search of all the authorities, both in England and in the United States, shows that every time the precise point involved has been considered the decision has been that the rule applies in subornation cases as well as in perjury cases—save for the two decisions in Missouri. The weight of decision is clearly against the holding below. Good reason is against it. The rule of proof ought not to depend on the *name* by which the offense is called. It is the *nature of the problem* which controls. And when that problem requires proof that an oath was *false*, the law requires something better than the oral testimony of a single witness.

III.

We do not believe this court should examine the record to determine whether the indictment states and the evidence shows a violation of Bankruptcy Act § 29-b (2) because the case was tried below as one for subornation of perjury. But anyhow, the conviction could not be sustained under the Bankruptcy Act, because the rule of evidence argued applies to false swearing under that act as well as to false swearing under the perjury statute.

The District Court ruled that the prosecution was under the perjury statute and not under the Bankruptcy Act (R. 44). The Circuit Court of Appeals held that the prosecution was under the perjury statute. This court will adhere to the theory below, and will not examine the record to see whether the result might be justified on some other theory.

U. S. v. *Staloff*, 260 U. S. 477, 481.
San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 96-97.
United Press v. *New York Press*, 35 App. Div. 444, aff'd 164 N. Y. 406.
3 *C. J.* 718, 723.
17 *C. J.* 203.

But even if the case could be regarded as under the Bankruptcy Act, the rule of evidence discussed in the preceding point would control and the exceptions taken be equally available. Proof of false swearing that does not amount to perjury involves "oath against oath," and there-

fore a prosecution for such false swearing cannot be sustained with a single uncorroborated witness.

Regina v. *Browning*, 3 Cox. C. C. 437, 438.
Aguierre v. *State*, 31 Tex. Cr. 517.
Commonwealth v. *Davis*, 92 Ky. 460, 462.

Dated, April 15, 1926.

Respectfully submitted,

ROBERT H. ELDER,
OTHO S. BOWLING,
Of Counsel for Petitioner.

APPENDIX.

(The most recent decisions in the several American jurisdictions as to the sufficiency of a single uncorroborated witness to establish the falsity of the oath in perjury cases.)

Alabama—

Pressly v. *State* (1921), 18 Ala. App. 40, 42-43.

Arkansas—

Clower v. *State* (1922), 151 Ark. 359, 363-364.

California—

People v. *Follette* (1925), 240 Pac. (Cal. App.) 502, 512-513. (A statutory rule.)

Canal Zone—

Canal Zone v. *Kerr* (1913), 2 Canal Zone 262, 268.

Colorado—

Thompson v. *People* (1899), 26 Colo. 496.

Connecticut—

State v. *Campbell* (1918), 93 Conn. 3, 12.

Delaware—

Marvel v. *State* (1925), 313 Atl. (Del. Gen. Sess.) 317, 318. (Here the proof was by circumstantial evidence. The single witness rule was criticized and questioned.)

Florida—

Yarbrough v. *State* (1920), 79 Fla. 256, 264-265.

Georgia—

Mallard v. *State* (1916), 90 S. E. (Ga. App.) 1044.

Illinois—

People v. *Niles* (1920), 295 Ill. 525, 532.

Indiana—

Hann v. *State* (1916), 185 Ind. 56, 60-61.

Iowa—

State v. *Young* (1911), 153 Ia. 4, 7.

Kansas—

State v. *Wilhelm* (1923), 114 Kan. 349, 353.

Kentucky—

Day v. *Commonwealth* (1922), 195 Ky. 790, 793.

Louisiana—

State v. *Jean* (1890), 42 La. Ann. 946, 949-950.

Massachusetts—

Commonwealth v. *Bullard* (1875), 119 Mass. 317, 324.

Michigan—

People v. *Kennedy* (1922), 221 Mich. 1, 4.

Minnesota—

State v. *Storey* (1921), 148 Minn. 398, 400-403. (Here the proof was circumstantial. The single witness rule was criticized and questioned.)

Mississippi—

Johnson v. *State* (1920), 122 Miss. 16.

Missouri—

State v. *Hardiman* (1918), 277 Mo. 229, 233-234.

Montana—

State v. *Gibbs* (1890), 10 Mont. 213, 124-125.

Nebraska—

Gaudy v. *State* (1889), 27 Neb. 707, 734.

New Mexico—
Territory v. *Remuzon* (1886), 3 New Mex. 648, 651.

New York—
People v. *Henry* (1921), 196 App. Div. 177, 183.

North Carolina—
State v. *Hawkins* (1894), 115 No. Car. 712, 715.

Ohio—
Ruch v. *State* (1924), 111 Oh. St. 580, 589.

Oklahoma—
Wright v. *State* (1925), 236 Pac. (Okla. Ct. App.) 633, 636.

Pennsylvania—
Commonwealth v. *Rogo* (1919), 71 Pa. Super. 109, 115.

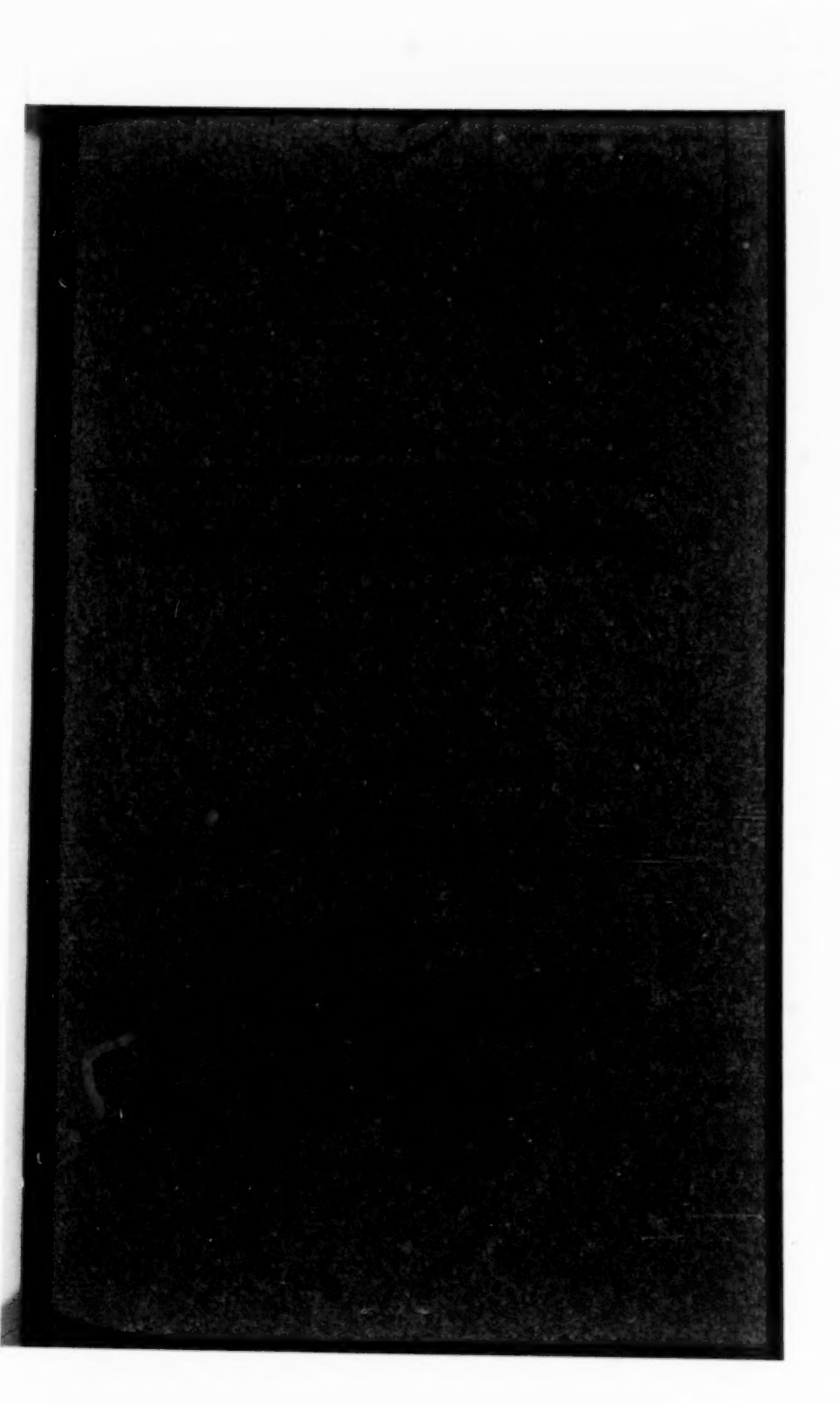
Philippine Islands—
People v. *Lozano* (1906), 7 Phil. Rep. 142, 143.

South Dakota—
State v. *Pratt* (1907), 21 So. Dak. 305, 311.

Texas—
Godby v. *State* (1921), 88 Tex. Cr. 360, 363. (A statutory rule.)

Washington—
State v. *Vane* (1919), 105 Wash. 170, 177.

West Virginia—
State v. *Miller* (1884), 24 West Va. 802, 805-806.



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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 317

CHARLES HAMMER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court is reported in 299 Fed. 1011 and appears in the record at page 53. The opinion of the Circuit Court of Appeals is reported in 6 F. (2nd) 786, and appears in the record at page 67.

JURISDICTION

The judgment of the District Court was entered on May 19, 1924 (R. 46–47), and that of the Circuit Court of Appeals on March 9, 1925 (R. 74–75).

The jurisdiction of this Court was invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

The petitioner was indicted in the United States District Court for the Southern District of New York under an indictment containing three counts. At the close of the government's case the court directed a verdict of not guilty on the first and third counts. (R. 36-37.) The second count (R. 4–7) alleged, in substance, that Annie Hammer was adjudicated a bankrupt and the proceeding was referred to a referee; that the petitioner " did knowingly, wilfully and corruptly suborn, instigate, induce, and procure " one Trinz to be sworn before the referee and, contrary to his oath, to state material matter which neither the petitioner nor Trinz believed to be true; that Trinz at the instigation and procurement of the petitioner did appear before the referee as a witness and was duly sworn; that it was material in the bankruptcy proceedings whether Trinz had loaned money to the bankrupt and whether the bankrupt had given him a note; that Trinz, in consequence of the subornation, instigation, inducement, and procurement of the petitioner swore that he had loaned the bankrupt money and that she had given him a note; that this was not true and Trinz and the petitioner did not believe it to be true; and that the petitioner knew that Trinz did not believe it to be true.

The jury found the petitioner guilty (R. 46) and the court sentenced him to imprisonment for the term of one year and ten month (R. 47).

THE PETITIONER'S CONTENTIONS

The petitioner urges two contentions as grounds for his claim that the conviction was erroneous:

(1) That a false oath in bankruptcy is not perjury, but a distinct offense, and therefore subornation of a false oath in bankruptcy can not be subornation of perjury.

(2) That there was no proof that Trinz's oath before the referee in bankruptcy was false except the testimony of Trinz himself, and the law requires such falsity to be proved by something more than a single witness.

STATUTES INVOLVED

Section 125 of the Criminal Code (35 Stat. 1111) is as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

Section 29 (b) of the Bankruptcy Act (30 Stat. 554) is as follows, italics indicating the particular portions of the section here involved:

> *A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently* (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) *made a false oath or account in, or in relation to, any proceeding in bankruptcy;* (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forebearing to act in bankruptcy proceedings. (Italics ours.)

Section 126 of the Criminal Code (35 Stat. 1111) is as follows:

> Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

Section 332 of the Criminal Code (35 Stat. 1152), is as follows:

Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

ARGUMENT

Summary

I. False swearing in bankruptcy proceedings is perjury. Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act should be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty. The two statutes denounce precisely the same offense; they differ only in matters relating to punishment.

II. Even if false swearing in bankruptcy proceedings is not perjury the judgment of conviction may be sustained on the ground that the petitioner was guilty of a violation of Section 29(b) of the Bankruptcy Act, under Section 332 of the Criminal Code, which makes any one who induces or procures the commission of an offense a principal.

III. The evidence was sufficient to sustain the judgment of conviction, although the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz. It is not clear that the petitioner's objection to the sufficiency of the evidence will be considered by this Court. *Cameron* v. *United States,* 231 U. S. 710.

The authorities against the extension to subornation of perjury of the rule in perjury cases that the falsity of an oath cannot be proved by the uncorroborated testimony of one witness are at least as strong as those for such extension. The only logical reason for the rule in perjury cases is that public policy requires that a witness be protected against a false accusation of perjury on the part of a defeated litigant seeking to revenge himself, and this reason has no application to a case like the present where the perjurer himself testified on the trial of the petitioner that his testimony before the referee in bankruptcy was false.

I

FALSE SWEARING IN BANKRUPTCY PROCEEDINGS IS PERJURY

Under Section 126 of the Criminal Code "whoever shall procure another to commit *any perjury* is guilty of subornation of perjury." The only material inquiry in this case, therefore, is whether false swearing in bankruptcy proceedings is perjury. If it is, it is immaterial whether it is denounced by Section 125 of the Criminal Code or Section 29(b) of the Bankruptcy Act.

The petitioner argues that Section 29(b) of the Bankruptcy Act creates a new offense which is not within the operation of Section 125 of the Criminal Code, and from this draws the conclusion that the new offense is not perjury. The authorities are opposed to each step in this argument.

In *Wechsler* v. *United States* (C. C. A. 2nd Cir.), 158 Fed. 579, the defendant had been convicted of false swearing in a bankruptcy proceeding. He had been tried under the assumption that the indictment was founded on Section 125 of the Criminal Code and an endorsement on the indictment referred to that section, and he was sentenced to punishment allowed by that section but in excess of the punishment authorized by Section 29(b) of the Bankruptcy Act. Apparently both the Government and the defendant contended that Section 29(b) created a new statutory offense; from this the Government argued that the conviction and sentence under Section 125 was proper and the defendant argued that the indictment should have been dismissed because it referred to the wrong statute. The court held that the two sections should be construed together; that the offense committed was within the provisions of Section 29(b) of the Bankruptcy Act, but that this required not a dismissal of the indictment but only a reversal of the judgment below and that the cause be remanded with instructions to enter a new judgment imposing such punishment as was permitted by Section 29(b). On pages 580–581, Judge Lacombe, writing the opinion of the court, after referring to Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act, said:

> It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of

either of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter which he did not believe to be true. When a person states matter which he does not believe to be true "wilfully and contrary to his oath," he may certainly be said to make a false oath "knowingly and fraudulently." We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty.

In *Epstein* v. *United States* (C. C. A. 7th Cir.), 196 Fed. 354, certiorari denied 223 U. S. 731, the contention of the defendant was precisely similar to that of the petitioner in the present case. The court said (pp. 356-357):

> In the Bankruptcy Act no denunciation or punishment is found for one who suborns another to make "knowingly and fraudulently a false oath or account in, or in relation to, any proceeding in bankruptcy." Therefore, the argument runs, Congress in enacting section 29 of the Bankruptcy Act took out from the definition of perjury as given in the earlier section 5392 the making of a false oath in a bankruptcy proceeding; and since section 5393 covers only those who procure others to commit "perjury" as defined in section 5392, and since subornation of false swearing in bankruptcy proceedings is nowhere specifically condemned, Congress intended that such subornation might be indulged in with impunity.
>
> In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is ex-

actly as if there were only one section denouncing and punishing perjury, as follows:

"Whoever, having taken an oath * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years: *Provided,* That if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years."

And upon this, which is the legal effect of the two sections, there would be no room for claiming that section 5393 (section 126 of the Penal Code) does not embrace subornation of every sort of perjury.

In *Ulmer* v. *United States* (C. C. A. 6th Cir.), 219 Fed. 641, certiorari denied 238 U. S. 638, the defendant had been convicted of "perjury in the giving of testimony before a referee in bankruptcy regarding a transaction between Ulmer and the bankrupt firm." The indictment contained three counts, all charging substantially the same false statement. The defendant was convicted and sentenced to imprisonment on each count, the sentences being expressly made successive and not concurrent. The aggregate of the three sentences was in excess of that permitted for one crime by Section 29(b) of the Bankruptcy Act, but no more than that permitted for one crime by Section 125 of the Criminal Code. The court held that only one crime

was involved and therefore reversed the sentence and remanded the case for new sentence upon the existing verdict. On pages 647–648 the court said:

> If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial, because the three sentences would aggregate no greater period than might have been imposed on conviction on one count (*Botsford* v. *United States,* 215 Fed. 510, 515, 132 C. C. A. 22); but the prosecution can not be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *United States,* 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, §29b(2), so as to charge that Ulmer "made a false oath in and in relation to a proceeding in bankruptcy." We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *United States,* 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than the two years specified in section 29b was unauthorized.

> This error goes only to the sentence, not to the verdict. It is impossible to allow the *sentence to stand on one* count and set aside the other two sentences, because we can not tell how much imprisonment the district judge would have imposed if proceeding under the theory which we have thought the right one.
>
> We therefore reverse and set aside the sentence and remand the case for new sentence upon the existing verdict.

It is clear that the court approved and followed *Wechsler* v. *United States,* and, in reversing the sentence but not the verdict, held that Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act authorized different punishments but did not create different offenses.

The petitioner states that *Kahn* v. *United States* (C. C. A. 2nd Cir.), 214 Fed. 54, certiorari denied 234 U. S. 763, and *Schonfeld* v. *United States* (C. C. A. 2nd Cir.), 277 Fed. 934, certiorari denied 258 U. S. 623, "seem inconsistent with the decision below." In each case the question involved was one of the proof necessary to establish the falsity of testimony given in bankruptcy proceedings in a subsequent prosecution for the giving of such false testimony. In *Kahn* v. *United States* some of the language of the court seems to indicate that it regarded "the crime of false swearing in bankruptcy" as different from "the crime of perjury," but the question was not necessarily involved since the court held that "the ancient rule of the com-

mon law requiring two witnesses to contradict the defendant's oath" in perjury cases "has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt," and that "the ancient rule has become inapplicable to modern conditions." It was for this reason that the court refused to apply the common-law rule, rather than because it did not regard false swearing in bankruptcy as perjury, for it said of Section 29 (b) of the Bankruptcy Act (p. 56):

> Of course, broadly stated, this is a perjury statute * * *.

Schonfeld v. *United States* expressly recognized that false swearing in bankruptcy is perjury. The indictment alleged that the defendant "committed perjury in violation of Section 125 of the Federal Criminal Code * * * in that he took an oath before a referee in bankruptcy and testified falsely * * *." In affirming the conviction on this indictment, the court said (pp. 938–939):

> False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. *Kahn* v. *United States*, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been

> practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing.

In addition, several cases, without discussing the statutes involved, have spoken of false swearing in bankruptcy as perjury. *Glickstein* v. *United States*, 222 U. S. 139; *Cameron* v. *United States*, 231 U. S. 710; *Hashagen* v. *United States* (C. C. A. 8th Cir.), 169 Fed. 396; *Daniels* v. *United States* (C. C. A. 6th Cir.), 196 Fed. 459; *Epstein* v. *United States* (C. C. A. 2nd Cir.), 271 Fed 282; *Gordon* v. *United States* (C. C. A. 8th Cir.), 5 F. (2nd) 943.

Not only is the defendant's contention that false swearing in bankruptcy is not perjury without support in the authorities, but in addition the alleged differences between Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act do not support the view that the sections create different offenses. The alleged differences are (pp. 10–11 of Petitioner's Brief):

1. The penalties are different.

2. The periods of limitation are different.

3. According to the petitioner "*materiality* is essential to perjury. It is not an element of the offense defined by the Bankruptcy Act."

The first two alleged differences relate only to punishment, not to the elements which constitute the offense. The third alleged difference, accord-

ing to the authorities, does not exist, because materiality *is* an element of the offense defined by the Bankruptcy Act.

Bauman v. *Feist* (C. C. A. 8th Cir.), 107 Fed. 83, 85; *Edelstein* v. *United States* (C. C. A. 8th Cir.), 149 Fed. 636, certiorari denied 205 U. S. 543; *Troeder* v. *Lorsch* (C. C. A. 1st Cir.), 150 Fed. 710, 713; *In re Chamberlain* (D. C. N. Y.), 180 Fed. 304, 309; *In re Gaylord* (C. C. A. 2nd Cir.), 112 Fed. 668; *Baskin* v. *United States* (C. C. A. 7th Cir.), 209 Fed. 740. As said in *Troeder* v. *Lorsch, supra:*

> * * * according to the practical construction of the statute, it is settled that the alleged false oath must contain all the elements involved in perjury at common law, namely, an intentional untruth in a matter material to an issue which is itself material.

We are dealing with the meaning of a statute, and the question whether Congress intended that false swearing in bankruptcy should be considered perjury within the meaning of that word as used in Section 126 of the Criminal Code, making it a crime to procure another to commit perjury. The contention of the petitioner supposes that Congress intended to leave the law in such condition that one who procures false swearing in other than bankruptcy cases is a criminal and must be punished, but one who procures false swearing in bankruptcy is guiltless and commits no offense deserving punishment.

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Common sense requires that such a view be rejected. Congress must have understood that false swearing in bankruptcy is perjury, so that procuring it is punishable under Section 126 of the Criminal Code. Otherwise, it would have enacted additional legislation to cover procuring such false swearing.

II

EVEN IF FALSE SWEARING IN BANKRUPTCY PROCEEDINGS IS NOT PERJURY, THE JUDGMENT OF CONVICTION MAY BE SUSTAINED UNDER SECTION 332 OF THE CRIMINAL CODE AND SECTION 29(B) OF THE BANKRUPTCY ACT

The indictment charged the petitioner with having suborned, instigated, induced, and procured Trinz to make a false oath in a bankruptcy proceeding, and the jury must have found this charge to be true. If false swearing in bankruptcy is not perjury, and the petitioner was therefore not guilty of subornation of perjury under Section 126 of the Criminal Code, there can be no doubt that he was guilty of a violation of Section 29 (b) of the Bankruptcy Act, under Section 332 of the Criminal Code, which makes any one who induces or procures the commission of an offense a principal. The punishment imposed by the court was authorized by Section 29 (b) of the Bankruptcy Act, and the judgment and sentence were therefor proper. It is immaterial that the indictment may have been drawn with a view to Section 126 of the Criminal Code. *Williams* v. *United States*, 168 U. S. 382, 389.

United States v. *Stafoff*, 260 U. S. 477, referred to in petitioner's brief (Brief, p. 33), is in no way inconsistent with this view. In that case it was held that where an indictment charged violation of certain provisions of the revenue laws relating to the production of distilled spirits, a conviction thereunder could not be sustained under the National Prohibition Act. Mr. Justice Holmes, writing the opinion of the Court, said on page 481:

> The indictment plainly purported to be drawn under the old law and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled out that might fall within the latter, although alleged with no thought of it or any suggestion to the accused that he must be prepared to defend against the different charge.

In the present case Section 125 of the Criminal Code and Section 29 (b) of the Bankruptcy Act are based upon the same policy, to prevent false swearing. The elements constituting the offense of procuring false swearing in bankruptcy proceedings are precisely the same whether such offense be regarded as subornation of perjury, made criminal by Section 126 of the Criminal Code, or procuring a violation of Section 29 (b) of the Bankruptcy Act, made criminal by Section 332 of the Criminal Code. Therefore, it could make no possible difference to the petitioner's rights whether he were prosecuted under one statute or

the other, and the judgment of conviction should be sustained whether or not the trial court was correct in treating the offense committed by the petitioner as subornation of perjury. *Vedin* v. *United States* (C. C. A. 9th Cir.), 257 Fed. 550, certiorari denied 250 U. S. 663.

III

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION

The petitioner contends that the evidence was insufficient to sustain the judgment of conviction, because the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz, who testified that what he swore to before the referee was not true. A precisely similar contention was made in *Cameron* v. *United States,* 231 U. S. 710. See Petitioner's Brief in that case, page 37. The court said (p. 724):

> Other errors are alleged, and it is contended that there was no adequate proof of the charges made, but these questions were submitted to the jury and can not be reexamined here.

It may be admitted as a general rule that the testimony of a single witness as to the falsity of the oath claimed to be perjured is insufficient to warrant a conviction on a charge of perjury. This rule, according to Mr. Justice Wayne, writing the opinion of this Court in *United States* v. *Wood,* 14

Pet. 430, 440, " rests upon the law of a presumptive equality of credit between persons, or upon * * * the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another."

So stated, the rule applies only where " there is merely the oath of one man to be weighed against that of another," and we believe both reason and authority are against its application in a case like the present where the perjurer himself testified on the trial of the petitioner that his previous testimony before the referee was false. As stated in *Boren* v. *United States* (C. C. A. 9th Cir.), 144 Fed. 801, 805, in such a case " the testimony does not consist of the oath of one person against that of the other. The testimony of each witness for the government involves, it is true, the impeachment of his own former sworn statement, but it is direct evidence against the accused as to his instigation of the perjury."

We will examine first the authorities in cases of subornation of perjury with a view to ascertaining whether the rule has been applied in such cases, and, second, certain perjury cases with a view to ascertaining whether the reasons for the rule are applicable in subornation cases and require its extension to such cases.

Cases of subornation of perjury

We have been able to find very few cases in which the question was actually involved whether, in a

prosecution for subornation of perjury, the falsity of the oath claimed to be perjured may be proved by the testimony of a single witness. The only case we have found in which the question was fully considered is *State* v. *Richardson,* 248 Mo. 563. In that case the court held that the court did not err in failing to instruct the jury that in order to find that perjury was committed, they must find that the same was proved by more than one witness, or by one witness corroborated by other facts and circumstances. This holding was not *dictum* as claimed in petitioner's brief (Brief, p. 28). It is true that several witnesses testified to facts which might perhaps have been regarded as corroboration as to the falsity of the oath (pp. 566–567), but the court did not consider the effect of this testimony and the case was submitted to the jury and decided by the appellate court on the theory that corroboration was not necessary, not on the theory that corroboration might be found in this testimony. The reasoning of the court in *State* v. *Richardson* is so conclusive that we think it best to set it forth at length. On pages 570–571 the court said:

> In perjury cases, the rule at common law, and which has been recognized by this court in *State* v. *Heed,* 57 Mo. 252; *State* v. *Faulkner,* 175 Mo. 546, and *State* v. *Hunter,* 181 Mo. 316, is, that the defendant cannot be convicted on the uncorroborated testimony of a single witness, and that it is error for

the court to fail to so instruct. If the same rule is to be invoked in favor of a defendant charged with subornation of perjury, it must be because the reason assigned for the rule in perjury cases exists with like effect in measuring the proof required in subornation cases. And in using this test, it becomes very necessary to inquire into the reason for the rule in perjury cases. The reason for the rule, as stated in *State* v. *Heed*, 57 Mo. l c. 254, is as follows:

"'In proof of the crime of perjury also it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict.' But this strictness has long since been relaxed; the true principle of the law being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence."

Mr. Best, in his work on evidence, gives as a further reason for the rule, that it has a tendency to cause a witness to testify with less apprehension or fear, and that by reason of the rule "little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice." [Best on Evidence, secs. 605, 606; 3 Wigmore on Evidence, sec. 2041.] By what course of logic can these reasons be made to apply to the case of a suborner? Why should the rule as to him be different from that applied

was as unworthy of belief as if he had been convicted and sentenced, and that therefore his testimony was not sufficient, but must be corroborated before the suborner could be convicted. The decision is clearly based not upon the "oath against oath" principle, but upon the court's view, influenced by the statute, that the testimony of the self-confessed perjurer was of little value.

In addition to the above cases, there are certain others in which the question under consideration was referred to although not necessarily involved. Thus in *Boren* v. *United States* (C. C. A. 9th Cir.), 144 Fed. 801, the court found that the testimony as to the falsity of the oaths was corroborated, but said (pp. 805-806):

> It is urged that there is not sufficient evidence to sustain the verdict, for the reason that the proof of each count consists of the testimony of a single witness. It is true that under indictments for perjury the generally accepted rule is that the accused can not be convicted on the uncorroborated testimony of a single witness. The reason assigned is that the same effect is to be given to the testimony of the party accused as to that of the accusing witness, and the proof would be merely the oath of one person against that of another. The reason of the rule in the form in which it is expressed does not apply to a case of subornation of perjury such as the present case for the reason that here the testimony does not consist of the oath of one

person against that of another. The testimony of each witness for the government involves, it is true, the impeachment of his own former sworn statement, but it is direct evidence against the accused as to his instigation of the perjury.

In *Commonwealth* v. *Douglass,* 46 Mass. (5 Metc.) 241, *Stone* v. *State,* 117 Ga. 705, *Bell* v. *State,* 5 Ga. App. 701, STATE v. *Wilhelm,* 114 Kan. 349, and *State* v. *Renswick,* 85 Minn. 19, convictions of subornation of perjury were sustained. In each case the holding was only that the act of subornation may be proved by the uncorroborated testimony of one witness. In each case the court said that the falsity of the alleged perjured oath must be proved by more than such uncorroborated testimony, but in none of the cases was this question involved, and in several of them this dictum was based upon some statute. A similar dictum was contained in *State* v. *Waddle,* 100 Ia. 57, where the prosecution was for an attempt to suborn perjury, which by statute was made a crime although no perjury was committed.

The scope of, and reasons for, the rule in perjury cases

The history of the rule that the testimony of a single witness as to the falsity of the oath claimed to be perjured is insufficient to warrant a conviction on a charge of perjury, is stated in *4 Wigmore on Evidence,* Section 2040 et seq., and it seems un-

necessary to discuss it here at any length. It is sufficient to say that the rule was originally derived from the ecclesiastical law, and that it survived in the common law because, as stated in *4 Wigmore on Evidence,* Section 2040:

> * * * a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force.

The petitioner's argument, as we understand it, is that the reason for the "oath against oath theory," that is, the quantitative theory of testimony, applies to proof of the fact that perjury was committed in a prosecution for subornation thereof as well as in a prosecution for the perjury itself, and applies to testimony of the perjurer in conflict with his former oath as well as to testimony of another person opposed to the alleged perjured oath. But the same argument would render the quantitative theory of testimony applicable in every criminal case. Since the accused is now competent to testify there is no ground for distinction in applying the quantitative theory of testi-

mony between perjury and other criminal cases. It is admitted that many cases, holding that the testimony of one witness without corroboration is insufficient to prove perjury, state that in such condition of the evidence there is merely oath against oath. No such case, however, so far as we have found, offers any adequate reason for the application of the quantitative theory of testimony in perjury and not in other criminal cases. It is submitted, therefore, that the reference to "oath against oath" in most if not all such cases may fairly be regarded as a mere statement of the rule and not as an endorsement of the quantitative theory of testimony.

Unless the quantitative theory of testimony be regarded as sound when applied to proof of perjury, there is no reason for extending the rule of evidence in perjury cases to cases of subornation of perjury. The only other reason suggested for the rule, so far as we have found, is that it is for the protection of witnesses, since public policy requires that a witness may testify without fear of a false accusation of perjury on the part of a defeated litigant seeking to revenge himself. *4 Wigmore on Evidence,* Section 2041. If the reason for the rule is the protection of witnesses it should not be extended to protect a suborner who is not a witness, and the rule is particularly inapplicable where the perjurer himself testifies to the falsity of his former oath. And, of course, if the rule is

merely historical, with no sound reason to justify it under modern conditions, it should be extended no further than precedent requires.

A majority of the cases in which the question has been fully considered support the view that the quantitative theory of testimony is not a sound reason for the rule in perjury cases. We believe that the question is practically concluded in this Court by the decision in *United States* v. *Wood*, 14 Pet. 430, in which it was held that perjury might be proved by writings emanating from the defendant himself, without the testimony of a living witness. On pages 439–440, the Court said:

> It must be conceded, no case has yet occurred in our own, or in the English courts, where a conviction for perjury has been had without a witness speaking to the *corpus delicti* of the defendant, except in a case of contradictory oaths by the same person. But it is exactly in the principle of the exception, which is by every one admitted to be sound law, that this court has found its way to the conclusion that cases may occur when the evidence comes so directly from the defendant, that the perjury may be proved without the aid of a living witness. * * *
>
> If it be true, then (and it is so), that the rule of a single witness being insufficient to prove perjury, rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms, the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of an-

> other; satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs, which existed, and are proved to have been in the knowledge of the person charged with the perjury, when it was committed, especially, if such written proofs came from himself, and are facts which he must have known, because they were his own acts; and the reason for the rule ceases.

The petitioner says of this case (Brief, p. 22):

> Modern decisions permit the falsity of the oath to be proved by circumstantial evidence, or by public records, or by writings emanating from the defendant himself * * * since these methods do not involve the balancing of one oath against another * * *.

But the court expressly based its conclusion upon the proposition that perjury may be proved by contradictory oaths of the same person. In other words, the oath against oath principle, or the quantitative theory of testimony, does not apply except where it is unsafe to convict because "there is merely the oath of one man to be weighed against that of another."

Moreover, if the quantitative theory of evidence is the true basis of the rule of evidence, the modern decisions which permit the falsity of an oath to be proved by circumstantial or documentary evidence should require that such evidence be equally strong and convincing as the direct testi-

mony which would be regarded as sufficient proof. Yet many cases permitting proof by circumstantial or documentary evidence hold that the ordinary rule of evidence in perjury cases is not applicable in such a case, and permit conviction whenever the jury is satisfied beyond a reasonable doubt. *People* v. *Doody,* 172 N. Y. 165; *State* v. *Wilhelm,* 114 Kan. 349; *Walker* v. *State,* 19 Ga. App. 98; *State* v. *Cerfoglio,* 46 Nev. 332; *State* v. *Storey,* 148 Minn. 398; *Marvel* v. *State* (Del.), 131 Atl. 317.

In *Marvel* v. *State,* the court criticized severely the old rule that no conviction can be had in a perjury case without the direct evidence of two witnesses or of one witness with corroborating evidence of some character, and, more particularly, the quantitative theory of evidence as a basis for the rule.

The court said (p. 318–319):

> The rule itself when tested by Twentieth Century principles of criminal law and evidence is far from satisfactory, but the reasons underlying the rule are even more unsatisfactory than the rule itself. Perjury (with the exception of treason) is the sole survivor of the common law trials where the quantitative theory of evidence still prevails. In treason the numerical requirement of witnesses is provided by the Constitutions, both State and Federal, and the reasons for the requirement do not apply to cases of perjury.

4 Wigmore on Ev. (Md. Ed.) 2066 et seq.; *Woodbeck* v. *Keller*, 6 Cow. (N. Y.) 118.

It seems unnecessary for us to trace the rule of evidence in perjury cases to its origin in order to show its incongruity to modern conditions. This has been ably done in 4 Wigmore, 2040 et seq. The rule originally prescribed that two witnesses were necessary in order to sustain a conviction for perjury. This requirement was at least consistent with the quantitative theory of evidence. For a long time, however, two direct witnesses have not been required, or as Baron Watson quaintly expressed it in *Reg.* v. *Braethwaite*, 8 Cox Cr. Cas. 254, 444, " that rule has now exploded." Later cases have, however, generally held that one witness giving positive evidence is sufficient if supported by corroborating circumstances. It is apparent that this new rule is at least a partial abandonment of the quantitative theory of evidence and has engrafted on the law of evidence a requirement as to the credibility of evidence, for the circumstantial corroboration which it demands of the positive witness must rest in theory upon the necessity of inducing or compelling a belief in the testimony of the single direct witness.

Almost every case upholding the rule has given as its reason for so holding that otherwise there would " only be oath against oath "; that the oath of the defendant alleged to be perjured is measured against

that of the prosecuting witness; that the scale of evidence is thus poised; and the equilibrium ought to be destroyed by material and independent circumstances before the defendant should be convicted.

This reasoning appears to be vulnerable from several angles. It is based upon the assumption that all oaths are of equal weight. It also assumes that the oath of the defendant given in the former proceeding which is alleged to be false is the defendant's oath in the perjury case on trial. This at least appears doubtful as it seems to make of the defendant a witness in the perjury case without his taking the witness stand and to clothe him with a presumption of truthfulness with no opportunity on the part of the prosecution to attack his credibility. Where the defendant becomes a witness in the perjury case and repeats the alleged false testimony given in the prior proceeding, then there may be oath against oath.

If the consideration of the oath of the defendant in the former trial as his oath in the subsequent perjury trial, without his becoming a witness therein, is founded on the archaic rule of the common law that the defendant was not permitted to testify in his own behalf, then the reasons for such rule have long since disappeared.

Finally it may be pointed out that in all criminal trials in this State the same situation of "oath against oath" may exist and the testimony of a single witness is sufficient to sustain a conviction, the weight

> and credibility of the testimony being questions for the jury to determine. The trial courts of Delaware have repeatedly held that a jury may convict, if it sees fit, upon the uncorroborated evidence of an accomplice being usually cautioned as to the danger of so doing. * * *
>
> It seems to us to approach the very acme of incongruity to hold that homicide, larceny, burglary, and all the crimes embraced in the category of criminal law may be proved by circumstantial evidence, while perjury, which strikes more nearly the vitals of judicial procedure, is alone immune from prosecution under color of a rule, the reasons for which have long ceased to exist. Such holding, it seems to us, has a direct tendency to bring a just reproach upon the administration of criminal law.

State v. *Miller*, 24 W. Va. 802, is also inconsistent with the quantitative theory of testimony. After referring to the common-law rule that in perjury cases the testimony of the prosecuting witness must be corroborated, the court said (pp. 807–808):

> But when the statute permits the defendant to be sworn before the jury in his own defence, as it does in our State in such case, and he avails himself of the right and is examined as a witness in his own behalf, the reason for the rule is gone, and the jury then is the sole judge of the weight to be given to his evidence, and the legal presumption of the truth of his statements previously made is removed, and the manner of the wit-

> ness in giving his evidence may be sufficient corroboration of the evidence of the prosecuting witness. Like any other case under such circumstances, the jury would be the exclusive judge of the credit to be given to the witnesses, and if they find him guilty, this Court could not on well-settled principles disturb the verdict.

Manifestly, to hold that the jury may find corroboration of the prosecuting witness in the manner of the defendant in testifying is in effect to hold that the verdict of the jury is to be based upon the credibility of the witnesses and not upon the number of witnesses on each side.

We think it is clear from the foregoing:

(*a*) That the authorities against the extension to cases of subornation of perjury of the rule in perjury cases that the falsity of an oath can not be proved by the uncorroborated testimony of one witness are at least as strong as those for such extension; and

(*b*) That the only logical reason for the rule in perjury cases is that public policy requires that a witness be protected against a false accusation of perjury on the part of a defeated litigant seeking to revenge himself, and that this reason has no application to a case like the present where the perjurer himself testified on the trial of the petitioner that his testimony before the referee in bankruptcy was false.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

MAY, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 317.—October Term, 1925.

Charles Hammer, Petitioner, *vs.* The United States of America.	Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[June 7, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner was indicted on three counts in the Southern District of New York. A verdict of not guilty as to the first and third was directed by the court. The jury found him guilty on the second; and the court sentenced him to the penitentiary for a year and 10 months. The judgment was affirmed on appeal. 6 F. (2d) 786.

The second count sets forth that Annie Hammer was adjudged a bankrupt on April 28, 1923, and that the proceeding was referred to one of the referees in bankruptcy in that district. The substance of the charge is that October 25, 1923, petitioner suborned and induced Louis H. Trinz to take an oath before the referee and there falsely to testify that prior to April 18, 1923, he had loaned $500 to the bankrupt and that she had given him a note therefor.

The petitioner contends that the making of a false oath in bankruptcy is not perjury; and that, without perjury there cannot be subornation of perjury. Section 125 of the Criminal Code provides that whoever, having taken an oath before a competent officer in any case in which a law of the United States authorizes an oath to be administered that he will testify truly, shall state any material matter which he does not believe to be true, is guilty of perjury and shall be fined not more than $2,000 and imprisoned for not more than five years. Section 29 b of the Bankruptcy Act, c. 541, 30 Stat. 544, 554, provides that a person shall be punished by imprisonment not to exceed two years upon conviction of the offense of having knowingly made a false oath in any proceeding in bank-

ruptcy. Section 126 of the Criminal Code provides that whoever shall procure another to commit any perjury is guilty of subornation of perjury and punishable as provided in § 125.

It is plain that the offense charged includes perjury as defined by § 125. That section is in general terms and is broad enough to apply to persons sworn in bankruptcy proceedings. The facts alleged include all the elements of that offense as well as the making of a false oath in bankruptcy; and they show a violation of both sections. The indictment does not specify the section under which it is drawn, but the omission is immaterial. The offense charged is to be determined by the allegations. *Williams* v. *United States*, 168 U. S. 382, 389. And it follows that petitioner was accused of subornation of perjury. Cf. *Weehsler* v. *United States*, 158 Fed. 579; *Epstein* v. *United States*, 196 Fed. 354; *Kahn* v. *United States*, 214 Fed. 54; *Ulmer* v. *United States*, 219 Fed. 641; *Schonfeld* v. *United States*, 277 Fed. 934. We need not consider whether perjury committed in bankruptcy proceedings may be punished by more than the maximum fixed by § 29 b, as the sentence imposed on the petitioner is less than that. Nor need we consider whether every false oath in bankruptcy is perjury under § 125.

Petitioner also contends that the evidence is not sufficient to sustain the judgment.

At the trial of petitioner, it was satisfactorily shown that Trinz was sworn in the bankruptcy proceeding and there gave the testimony alleged to have been false and suborned. Trinz was the only witness called to prove the falsity and subornation. He testified that he gave the testimony alleged in the indictment; that it was not true, and that petitioner suborned him. At the close of all the evidence the petitioner moved the court to direct a verdict in his favor on the ground that the uncorroborated testimony of Trinz was not sufficient to warrant a finding of guilt. The motion was denied. And, on the request of the prosecution, the court charged the jury that the law did not require any corrobation of that testimony; and that, if believed, it was sufficient.

The question of law presented is whether the unsupported oath of Trinz at the trial of petitioner is sufficient to justify a finding that the testimony given by him before the referee was false. The general rule in prosecutions for perjury is that the uncor-

roborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal.* The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice. On the issue of falsity the case presented is this. On the first occasion Trinz testified that he had loaned money to the bankrupt and that she had given him a note. At the trial he swore that his statement before the referee was not true. The contest is between the two oaths with nothing to support either of them. The question is not the same as that arising in a prosecution for perjury where the defendant's own acts, business transactions, documents or correspondence are brought forward to establish the falsity of his oath alleged as perjury. That, in some cases, the falsity charged may be shown by evidence other than the testimony of living witnesses is forcibly shown by the opinion of this court in *United States* v. *Wood*, 14 Pet. 430, 443. That case shows that the rule, which forbids conviction on the unsupported testimony of one witness as to falsity

*United States v. Wood, 14 Pet. 430, 437, et seq.; United States v. Hall, 44 Fed. 864, 868; Allen v. United States, 194 Fed. 664, 667-668; Peterson v. State, 74 Ala. 34; Clower v. State, 151 Ark. 359, 363; People v. Follette (Cal.), 240 Pac. 502, 511; Thompson v. People, 26 Colo. 496, 503; State v. Campbell, 93 Conn. 3, 12; Marvel v. State, (Del.) 131 Atl. 317; Cook v. United States, 26 D. C. App. 427, 430; Yarbrough v. State, 79 Fla. 256, 264; People v. Niles, 295 Ill. 525, 532; Hann v. State, 185 Ind. 56, 60-61; State v. Raymond, 20 Ia. 582, 587; State v. Wilhelm, 114 Kan. 349, 353; Day v. Commonwealth, 195 Ky. 790, 793; State v. Jean, 42 La. Ann. 946, 949; Newbit v. Statuck, 35 Me. 315, 318; Commonwealth v. Butland, 119 Mass. 317, 324; People v. Kennedy, 221 Mich. 1, 4; State v. Story, 148 Minn. 398; Johnson v. State, 122 Miss. 16; State v. Hardiman, 277 Mo. 229, 233; State v. Gibbs, 10 Mont. 213, 219; Gandy v. State, 27 Neb. 707, 734; State v. Cerfoglio, 46 Nev. 332, 340; People v. Evans, 40 N. Y. 1, 5; Territory v. Remuzon, 3 N. M. 648; State v. Hawkins, 115 N. C. 620; State v. Courtright, 66 Ohio St. 35; Wright v. State, (Okla.) 236 Pac. 633, 636; Williams v. Commonwealth, 91 Pa. St. 493, 501; State v. Pratt, 21 S. D. 305, 311; Godby v. State, 88 Tex. Crim. Rep. 360, 363; State v. Sargood, 80 Vt. 415, 421; Schwartz v. Commonwealth, 27 Grat. 1025; State v. Rutledge, 37 Wash. 523, 527. And see An Act to consolidate and simplify the Law relating to perjury and kindred offenses (1911) I & 2 Geo. V, c. 6, § 13.

of the matter alleged as perjury, does not relate to the kind or amount of other evidence required to establish that fact. Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence of such falsity than any amount of oral testimony.

As petitioner cannot be guilty of subornation unless Trinz committed perjury before the referee, the evidence must be sufficient to establish beyond reasonable doubt the falsity of his oath alleged as perjury. The question is not whether the uncorroborated testimony of Trinz is enough to sustain a finding that he was suborned by the petitioner. It is whether, as against the petitioner, his testimony at the trial is enough to sustain a finding that his oath before the referee was false. Clearly the case is not as strong for the prosecution as where a witness, presumed to be honest and by the government vouched for as worthy of belief, is called to testify to the falsity of the oath of defendant set forth as perjury in the indictment. Here the sole reliance of the government is the unsupported testimony of one for whose character it cannot vouch—a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited. *People* v. *Evans*, 40 N. Y. 1, 3.

To hold to the rule in perjury and to deny its application in subornation cases would lead to unreasonable results. Section 332 of the Criminal Code abolishes the distinction between principals and accessories and makes them all principals. One who induces another to commit perjury is guilty of subornation under § 126 and, by force of § 332, is also guilty of perjury. In substance subornation is the same as perjury. And one accused of perjury and another accused of subornation may be indicted and tried together. *Ruthenberg* v. *United States*, 245 U. S. 480; *Commonwealth* v. *Devine*, 155 Mass. 224. Obviously the same rule of evidence in respect of establishing the falsity of the matter alleged as perjury must apply to both. Evidence that is not sufficient to warrant a finding of that fact as against the one accused of perjury cannot reasonably be held to be enough as against the other who is accused of suborning the perjury. No such distinction can be maintained. The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in per-

jury cases. *People* v. *Evans, supra.* Falsity is as essential in one as in the other. It is the *corpus delicti* in both.

The trial court should have directed the jury to return a verdict of not guilty on the ground that the uncorroborated testimony of Trinz at the trial was not sufficient as against petitioner to establish the falsity of the oath alleged as perjury. We need not consider whether his testimony was sufficient to establish the fact of subornation.

Judgment reversed.

A true copy.

Test

Clerk, Supreme Court, U. S.